IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1315

HOWARD ALEXANDER, *et al.*,
Petitioners,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA

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CHRONOLOGICAL LIST OF IMPORTANT DATES

May 19, 1970 - Petition for Order to Declare Books Obscene Pursuant to § 18.1-236.3 of the Code of Virginia, 1950, as amended

Subpoena Duces Tecum Issued returnable May 22, 1970

May 22, 1970 - Motion Quash Subpoena Duces Tecum Denied

June 3, 1970 - Petition for Order Temporarily Restraining the Sale or Distribution of Certain Books

Show Cause Order returnable July 17, 1970

June 12, 1970 - Motion for Stay; Motion to Dismiss; Answers to Petition for Order Temporarily Restraining the Sale or Distribution of Certain Books

July 30, 1970 - Answer to Petition for Order to Declare Books Obscene Pursuant to § 18.1-236.3 of the Code of Virginia, 1950, as Amended

August 19, 1970 , - Argument, Motion to Dismiss

November 4, 1970 - Trial Commenced.

November 5, 1970 - Trial Concluded.

November 20, 1970 - Memorandum Opinion, Court of Hustings for the City of Portsmouth

December 30, 1970 - Order of the Court of Hustings for the City of Portsmouth

INDEX TO APPENDIX

The Opinion of the Supreme Court of Virginia, 212 Va. 554, 186 S.E.2d 43 (1972), appears in the Appendix to the Petition for Writ of Certiorari at page 1a.

The Petition for Order to Declare Books Obscene pursuant to § 18.1-236.3 of the Code of Virginia, 1950, as Amended, appears in the Appendix to the Petition for Writ of Certiorari herein, at page 3a.

The Petition for Order Temporarily Restraining the Sale or Distribution of Certain Books appears in the Appendix attached to the Petition for Writ of Certiorari herein, at page 4a.

The Notice accompanying the Petition for Order Temporarily Restraining the Sale or Distribution of Certain Books appears in the Appendix attached to the Petition for Writ of Certiorari herein, at page 5a.

The Show Cause Order of the Court of Hustings for the City of Portsmouth entered June 3, 1970, appears in the Appendix attached to the Petition for Writ of Certiorari herein, at page 6a.

The Memorandum Opinion of the Court of Hustings for the City of Portsmouth entered November 20, 1970, appears in the Appendix attached to the Petition for Writ of Certiorari herein, at page 16a.

The Order of the Court of Hustings for the City of Portsmouth entered December 30, 1970, appears in the Appendix attached to the Petition for Writ of Certiorari herein, at Page 18a.

§ 18.1-236.3 Code of Virginia, 1950, as Amended, appears in the Appendix attached to the Petition for Writ of Certiorari herein, at page 19a.

Amendments to the Constitution of the United States of America appear in the Appendix attached to the Petition for Writ of Certiorari herein, as follows:

Amendment One at page 23a
Amendment Five at page 23a
Amendment Six at page 23a
Amendment Seven at page 24a
Amendment Fourteen at page 24a

VIRGINIA: IN THE COURT OF HUSTINGS
FOR THE CITY OF PORTSMOUTH

IN THE MATTER OF A NUMBER OF
BOOKS ALLEGED TO BE OBSCENE
PURSUANT TO SECTION 18.1-236.3

Law Docket
No. 6244

MOTION TO DISMISS PETITION

Now comes the Respondents, Howard Alexander and Frank Collier, and Village Books, Inc., and Media Arts and Guild Press Ltd., and move the Court to dismiss the Petition herein upon the ground that said Petition is based upon Section 18.1-236.3 of the Code of Virginia, which section of the Code is unconstitutional being repugnant to the First Amendment to the Constitution of the United States of America.

For grounds hereof, Respondents state that said Statute permits a prior restraint upon presumptively protected literary materials and permits suppression of non-obscene literary materials without a prior adversary hearing and permits suppression of non-obscene materials for an indefinite time and is therefor unconstitutional; *Kingsley Books, Inc. v. Brown,* 354 U.S. 436; *Freedman v. Maryland,* 380 U.S. 51; *Bantam Books, Inc. v. Sullivann,* 372 U.S. 58.

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[Certificate of Service Omitted in Printing]

[Caption omitted in printing]

MOTION FOR A STAY OF PROCEEDINGS

Now comes the Respondents, Howard Alexander and Frank Collier and Village Books, Inc., and move the Court to stay the proceedings herein to allow the United States District Court for the Eastern District of Virginia, Norfolk Division, to determine the constitutionality of Section 18.1-236.3 of the Code of Virginia in civil action number 429-70-N filed June 11, 1970, entitled: Howard Alexander, et al. v. Von L. Piersall, Jr., Commonwealth Attorney for the City of Portsmouth, et al., a copy of which Complaint is attached hereto as Exhibit A.

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ANSWER TO PETITION FOR ORDER TO DECLARE BOOKS OBSCENE ETC.

Now comes the Respondents, Howard Alexander and Frank Collier, and Village Books, Inc., and Media Arts and Guild Press Ltd., answering the Petition For Order To Declare Books Obscene, etc., as follows:

1. Respondents admit the allegations of fact contained in paragraph (1) of the Petition.

2. Respondents admit that Howard Alexander and Frank Collier are engaged in the sale and commercial distribution of magazines at the address 513 High Street in the City of Portsmouth, Virginia, the premises of the Respondent, Village Books, Inc., Respondents denying that said magazines are obscene as alleged and denying the remaining allegations of paragraph (2) of the Petition.

3. Respondents admit that the names or titles and publishers of the challenged magazines involved herein are attached to the Petition, as alleged in paragraph (3) of the Petition.

4. Respondents admit that some of the magazines involved contain photographs of totally nude bodies of males and females wherein the genitals of the models are exposed. Respondents deny the remaining allegations, paragraph (4) of the Petition.

Wherefore, Respondents respectfully pray the Court to dismiss the Petition herein, without costs to the Respondents.

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TRANSCRIPT OF PROCEEDING

Before Hon. R. Winston Bain, Judge,
Portsmouth, Virginia,
May 22, 1970.

* * * *

[2] MR. PIERSALL: Rather than look at the index 18.1-236 is the section primarily involved.

THE COURT: All right, I will be glad to hear the moving party.

MR. LAWLESS: Your Honor, initially I would have a motion to quash the subpoena duces tecum.

* * * * *

[13] MR. PIERSALL: Well, your Honor, my point is he is not an adversary party as set out in the motion to quash, and that certainly he is here today. They have appeared and if there is any objection to notice we feel like they have certainly waived that by appearing and in arguing the matter. We feel that, primarily, of course they are not an adversary party in the matter.

THE COURT: I think the Commonwealth's position is well taken on this and that the court does not feel that by this proceeding on the subpoena duces tecum that this gentleman that you spoke of, Mr. Collier, is being in any way put in the position of incriminating himself. The court feels the Commonwealth's position is well taken and overrules the motion to quash the subpoena duces tecum.

MR. LAWLESS: Note our exception. May I have a short recess to confer with my client?

* * * * *

Before Hon. R. Winston Bain, Judge,
Portsmouth, Virginia,
June 12, 1970.

* * * * *

[2] MR. DIETZ: Thank you, sir. At this time on behalf of the respondent, I would like to leave to file a motion for a stay of these proceedings. In the Motion I have stated, a copy of the complaint which we filed in the United States District Court for the Eastern District of [3] Virginia, Norfolk Division is attached, but I understand that the court and the Commonwealth attorney, Mr. Piersall, have received copies of that complaint and therefore have not attached same to this motion.

THE COURT: No, that is all right, we received them yesterday.

MR. DIETZ: Now, your Honor, if I might address myself to the motion for a stay of proceedings.

THE COURT: All right, I will be glad to hear from you. Mr. Piersall, have you seen a copy of it?

MR. PIERSALL: Yes, sir, I have a copy of it.

* * * * *

[14] THE COURT: Well, gentlemen, the very fact that you have filed a civil action in the federal court, I don't feel that that as such is reason that I should consider this motio for a stay under the procedure as set forth in our Code. Not feeling there is any merit in the motion, I am going to overrule your motion for a stay in the proceedings.

MR. DIETZ: Under the Virginia procedure, I believe it is proper that I at this time on behalf of the respondents request an exception to your Honor's ruling.

THE COURT: That is correct.

Gentlemen, let us take a little break now before we go into the other matter.

(Whereupon, the court recessed at 10:50 A.M. After recess the following took place:)

MR. PIERSALL: Judge, I will speak. Mr. Dietz and I would make a joint motion to continue this hearing on my motion for a temporary restraining order until June the 24th, I believe.

MR. DIETZ: That is correct, sir.

MR. PIERSALL: And at that time we will [15] return at the point where we are now.

THE COURT: Very well. Then upon the joint motion of both of you the court will continue this case until ten o'clock A.M. on Wednesday, the 24th day of June of this year. So, gentlemen, we will all reconvene for the hearing on the motion at that time.

MR. DIETZ: Thank you, sir.

THE COURT: Fine.

* * * * *

August 19, 1970

* * * * *

[2] MR. DIETZ: Yes, sir. May it please Your Honor, the respondents in this case have filed a motion to dismiss the petition based upon the position that this provision of the Virginia Code 18.1-236.3 is repugnant to the Constitution of the United States, Amendments 1, 4, 5 and 14.

I would like at this time to briefly argue this motion and ask the Court to dismiss the petition upon this ground.

First, we contend that the code, Virginia Code, in Sections 7 and 8 which I will now read, Section 7—Excuse me; I think I will skip over 7 and present provision Section 8: "If an appearance is entered and an answer filed, the Court shall order the proceedings set on the

calendar for a prompt hearing. The Court shall conduct the hearing in the court of civil procedure applicable to the cases without a jury," et cetera.

Now, the first point that we wish [3] to raise is that the respondents, by this procedure, are denied their right to trial by jury.

At this time, I will formally, upon behalf of the respondents, demand a trial by jury of all of the issues raised by this petition.

I realize that the code specifically prohibits this demand, so I assume that Your Honor will deny the request for the jury trial.

That is the first point.

THE COURT: I can rule on that right now. I overrule your motion.

* * * * *

[4] Now, the next point that we allege the Virginia statute is unconstitutional in that it discriminates against adults who have a right to purchase and possess [5] erotic literature, being a matter of taste, and that is, according to Section 7 of your Virginia Code, and Section 7, in spelling out the standards that the Court should follow, says–

THE COURT: Wait a minute. Which section are you referring to?

MR. DIETZ: Section 7 of the Virginia Code which is 18.1-236.3. I should call it Subsection 7.

* * * * *

MR. DIETZ: * * * [12] Now, the next point that I would raise is that the code provision which is Virginia Code Provision Subsection 5, which provides, after an order to show cause was issued pursuant to the code, upon four days notice to be given to the persons in a

manner prescribed by the Court, the Court may issue a temporary [13] restraining order against the sale or the distribution of the book alleged to be obscene.

We contend that that section makes the statute unconstitutional, that subsection makes the statute unconstitutional because it allows for a prior restraint, the restraint prior to any adversary judicial hearing, and the authority for that position, Kingsley Books, Inc., v. Brown, which I cited before, Friedman v. Maryland, 380 U.S. 51, and Bantam Books, Inc., v. Sullivan, 372 U.S. 58.

* * * * *

[14] I might state that in your Virginia Code, there are no time limits established. There is no statement other than that the Court should promptly consider—Well, I will go into detail on that point because I think this is very important and spell it out clearly.

The point is that the code is unconstitutional because it does not provide any safeguard regarding time limitations of the procedures set forth in the code.

Now, in the code section, Subsection 3, it provides that "Upon the filing of the petition, that the Court, in turn or on vacation shall examine the alleged books to see if they are obscene." That is very clear once the petition is filed.

Following that, there is no other guarantee of prompt action contained other than Section 8, or I should say Subsection 8 of the code where it says, "If an appearance is entered and an answer filed, the Court shall order the proceedings set on the calendar for a prompt hearing."

After that, there is absolutely nothing in your code provision prescribing time limitations.

According to the decisions, starting with Kingsley Books v. Brown, followed in all the cases, the Supreme

Court has had Bantam Books, every one, wherever the statute does not have time limitations imposed, then it has been held unconstitutional because it allows for unlimited delay, the restraint of materials without decisions.

* * * * *

[17] MR. DIETZ: * * * [19] And now the next point that I would raise as far as the claimed unconstitutionality of the Virginia Code is that Code Subsection 8-b does not provide proper standards for consideration of the national community standards of tolerance.

THE COURT: Which section?

MR. DIETZ: Subsection 8-b. Subsection 8-b provides a degree of public acceptance of a book or books of similar character within a county or city in which the proceeding is brought.

That should be the standard Your Honor should follow in determining the alleged obscenity of a material.

My point to the Court is that Your Honor is not to take the local standard for the City of Portsmouth, or I think this—correct me if I am incorrect—[20] I think this is Norfolk County.

THE COURT: No. Norfolk County no longer exists. You have the City of Chesapeake and the City of South Norfolk some years ago merged—Well, old Norfolk County and the City of South Norfolk merged and became the new City of Chesapeake.

Virginia used to have twenty years ago one hundred counties, but now I think it's approximately ninety-seven.

A couple of them merged over on the Peninsula; Newport News and Hampton merged with their counties, adjoining counties.

MR. DIETZ: The point that I am making to the Court is that this community, whether it be county or city, is too limited. I would urge the Court to adopt the position that even a state-wide area, if it's stated for the State of Virginia, that that would be too limited, and the position I urge the Court to adopt is that it's a national community standard that must be considered because it's a national Constitution.

* * * * *

[28] MR. DIETZ: Now, we also contend that the entire code section is unconstitutionally vague and indefinite. It does not spell out, at least as we can understand it, whether this is an injunction statute or a quasi-criminal statute. The code [29] provision Section 13 says—I should say Subsection 13—says, "It's expressly provided that the petition and proceeding authorized under this article relating to books said to be obscene shall apply only to cases where the establishment of such scienter is thought to be useful or desirable by the petitioner and the provisions of Section 18.1-236.3 shall in nowise be construed to be a necessary prerequisite to the filing of criminal charges under this article."

Now, that is the anchorman, the very last words of the code provision.

Now, I can't determine from that whether this authorizes the Court, if you determine that these books are obscene, to issue an injunction prohibiting the sale or possession of these books because the only provision as far as an injunction is in subparagraph 5 wherein the code provides "When an order to show cause is issued pursuant to this article and upon four days notice to be given to the person and in the manner prescribed by the [30] Court, the Court may issue a temporary restraining order against

the sale or distribution of the book alleged to be obscene."

The code provision is absolutely void as far as granting the Court jurisdiction to enter any permanent injunction or any other action, and I just don't know if this is what would follow of if this is really quasi-criminal because if it's quasi-criminal and it so provides by subparagraph 13 "that the purpose is to establish scienter in cases where the establishment of scienter is thought to be useful," in my way of thinking that knowledge scienter and the establishment thereof could only be useful or desirable in a criminal prosecution where the defendant could conceivably raise as a defense under Smith v. California, a case like that, that he didn't know that the books or magazines that he was selling in his book store were obscene, and if the purpose of this proceeding is to establish this element of the criminal charge which [31] the Supreme Court of the U.S. is a necessary element to be proven in any obscenity criminal prosecution, then I would say that the defendant in a criminal case, the respondent in this civil case is certainly being denied his right of trial by jury on that issue which would have been adjudicated before a civil court, sitting without a jury.

I would certainly say that that raises a Constitutional issue.

* * * * *

[41] MR. DIETZ: * * * [43] Your Honor, there was one other point that I wanted to raise before but which I didn't. I would like to mention it to Your Honor briefly.

I feel that the Virginia Code, which I suddenly lost in this maze of papers, the Virginia Code provision is unconstitutional and that the procedures by which it was

applied in this case are unconstitutional, and I am referring to at the very outset of this case, and I am not sure but I think it was even prior to the filing of the petition with the Court, there was filed and served upon the respondent, Collier, Village Book Store, and there was filed but I don't think it was actually served [44] upon the respondent, Alexander, subpoena duces tecum requiring those defendants to appear in court to produce all of the magazines which were originally listed in the subpoena.

Now, we feel that this was unconstitutional in violation of their rights, the respondents' rights under the Fourth Amendment and under the Fifth Amendment because you were forcing them to supply evidence and testimony against themselves by use of the subpoena duces tecum.

I refer, Your Honor, to Boyd v. U.S., 116 U.S. 616 at Page 634 and 635. That is also found in 6 Supreme Court 524, 29 Lloyds Edition 746.

* * * * *

[49] THE COURT: Very well, gentlemen. I will take this matter under advisement and, Mr. Dietz, are you having this transcript prepared?

MR. DIETZ: Yes, Your Honor. I certainly intend to order a copy of the transcript as I do in all cases, in all proceedings in all cases in which I am involved, and I will formally request the reporter to submit the original to the Court as soon as possible so you will have the opportunity to use it in your deliberations of the case.

* * * * *

[50] THE COURT: Gentlemen, that concludes the hearing. We will recess now for the summer.

MR. DIETZ: The only thought that occurs to this counsel, of course I have no way of knowing when the reporter will complete the transcript and when she will be able to deliver it to the Court.

Your Honor is going on vacation. I don't know when you will have an opportunity to rule, but I assume your ruling will be given prior to the trial date, the 23rd of September.

THE COURT: I will rule around that time, but let me express myself this way. Prepare yourself now without my having considered the motion at all, prepare yourself now for the adversary hearing [51] on September 23. This is the vacation time. I could try to let you hear from me sometime before, but if you don't hear from me, then please assume that the motion will be overruled on the morning of the 23rd.

MR. DIETZ: Thank you.

* * * * *

November 4, 1970

* * * * * *

[3] MR. PIERSALL: Your Honor, I think I can say this safely. There will be a slight stipulation, briefly, as to the facts in this case. We would like to stipulate, and I believe we can, that these books which have been offered for sale in the City of Portsmouth in the Adult Book Store were offered to adults only.

THE COURT: Is that correct?

MR. DIETZ: Yes, Your Honor. What the Respondent would agree to stipulate and what I informed Mr. Piersall is that all of these magazines were on display in my client's adult book store in the City of Portsmouth, and any adult who came into the store who wanted to buy the books or [4] magazines who had the price of the book would have been permitted to purchase it.

THE COURT: Very well, sir.

MR. DIETZ: In different words, but the same thing. We will so stipulate and the Commonwealth will agree to that so it will not be necessary for the State to offer testimony that these books were sold or any attempt to purchase because they were there to be sold.

THE COURT: Fine.

MR. PIERSALL: That's fine, Judge.

I would like to call as my first witness, Mr. Holley.

* * * * *

ROBERT L. HOLLEY, a witness having been first duly sworn, was called to the witness stand in behalf of the Commonwealth and upon being examined, testified as follows:

DIRECT EXAMINATION

BY MR. PIERSALL:

Q. State your name, please. A. Robert L. Holley.

* * * * *

[5] MR. PIERSALL:

Q. You are Robert L. Holley. What is your occupation? [6] A. District Manager, Equitable Life Insurance Society of the United States.

Q. What is your address? A. Residence or business?

Q. Residence. A. Residence, 4500 Norman Road, Portsmouth.

Q. City of Portsmouth? A. Yes, sir.

Q. How long have you been a resident of the City of Portsmouth? A. Fifteen years.

Q. You were not born here, is that right? A. That's right.

Q. Where were you born? A. Pennsylvania.

Q. Where did you go to school? A. College of William and Mary, Williamsburg.

Q. Did you go to school in Pennsylvania at all? A. Elementary school; public school system in Pennsylvania.

Q. Since you graduated from college, have you been in Virginia? [7] A. Yes. Since graduating in 1941 I worked throughout the State of Virginia.

Q. How long would you say you have been in Virginia. Would it be more than fifteen years? A. Yes; since 1946. I went to William and Mary and except for vacations, I have resided in Virginia.

Q. All right. Pursuant to a request by me did you examine certain books or magazines which were at the time in the custody of the Clerk of the Court of Hustings? A. Yes, I did.

Q. Will you step over here to this table, please, and look at these books? A. (Witness leaves witness stand.) Do you want me to identify all these books?

Q. I just want you to identify all these books. I just want you to look at them. They are in the same boxes I presume. Can you tell me whether or not you looked in the books in these boxes? A. Those boxes are similar, if not the same ones, I looked, at the books.

Q. Look at these and determine if these are the same ones. [8] A. Could it be determined by looking at this sheet?

Q. Yes, sir. Could you determine if you looked at these books on the list?

Mr. Dietz, can you identify this list of books I filed with my pleadings?

MR. DIETZ: Yes, sir. That is the list that was attached to the show cause order which was issued on June 3, 1970.

MR. PIERSALL:

Q. And you looked at the books which are on that list? A. Yes, sir.

* * * * *

[9] MR. PIERSALL: All right.

Q. Proceed, Mr. Holley.

A. To answer your question, it appears that those were the books that match this list, yes, sir.

Q. That's fine. Now, for what purpose did I ask you to look at these books and for what purpose did you look at these books? A. To see if they met a community standard as to obscenity.

Q. Have you personally had any experience other than this experience in examining and reviewing matters which were suggested to be obscene? A. Yes, sir.

Q. In what capacity have you had this experience? A. Several years ago, probably five to seven years ago, I was appointed chairman of an areawide Chamber of Commerce committee composed of four local cities plus Suffolk and Nansemond.

[10] Q. Four cities were in this? A. A representative from each city. As a committee we investigated obscene matters including movies and magazines, et cetera.

During this process of study we felt we found what the community standard was throughout the whole area.

Q. What efforts did you make in order to find out what the local community standard was? A. We purchased magazines from different locations throughout the community and displayed these to different civic groups and different organizations that we met with and got their reaction to them.

About two years ago I was asked to do a similar study here in the City of Portsmouth, and using the same process, I was told by a professional in the sampling

business that I probably contacted to what would be equivalent to about 30,000 people in the City of Portsmouth by sampling.

Q. By sampling? You didn't actually contact them? A. By sampling. I don't know how he arrived at this figure. I told him who I contacted. He [11] came up with this figure.

Q. Did you take certain books to clubs and have them look at these books? A. Yes, sir. At that particular time, the Assistant Commonwealth's Attorney asked me to assist him in the case. At that time I believe there were three books in another case.

I put those three along with seven other magazines that we had from this previous Chamber of Commerce committee, laid the ten out, and asked them to pick the three most objectionable books.

In every case but one, all three of those particular magazines were picked as most objectionable.

Q. Did you discuss with these groups their feelings as to what the community standard was insofar as the portrayal of sex in the magazines and movies and so on? A. Would you ask that question again? Did I discuss with them?

Q. Was there any discussion of any kind between you and the group that you met with concerning the community standards insofar as the display of sex in the books, magazines, and movies? [12] A. Yes, sir; general discussion.

MR. DIETZ: I am going to have to object to his question, not on the basis of hearsay but I would first like to know where these groups were and what community standards; whether it was a community standard for the City of Portsmouth or supposedly the community standard for Newport News or wherever it was.

I think that until that is added to the question then the answer must be too indefinite to be material to the issues before this court.

MR. PIERSALL: I thought, Judge, he had already stated. I may be wrong.

THE COURT: He mentioned about the community standards but I don't think he has told us exactly what it is.

MR. PIERSALL: All right, sir.

Q. Mr. Holley, in your research in this matter, what area were you dealing with? A. In the immediate section of the City of Portsmouth and the immediate Chesapeake Borough.

Q. That would be the immediate area of [13] Chesapeake and Portsmouth? A. Yes, sir. Basically, the Western Branch Borough of Chesapeake.

Q. Nor the whole part of Chesapeake? A. No, sir. I am referring now to this whole study that I made about a year and a half ago; two years ago.

THE COURT: Your first study, I understand, you say it was very wide and that you were chairman of a committee?

THE WITNESS: Yes, sir.

THE COURT: United with other chambers of Norfolk, Virginia Beach, Portsmouth, Newport News, Suffolk, and Nansemond, I believe you said?

THE WITNESS: Yes, sir; five or six years ago.

BY MR. PIERSALL:

Q. That was some years ago, and you investigated the community standards or area standards then? A. Yes, sir.

Q. Then a year and a half ago you did this work in Portsmouth and the Western Branch District of the City of Portsmouth? Chesapeake? A. Yes, sir.

THE COURT: Now you can ask what standards were developed.

[14] BY MR. PIERSALL:

Q. As I understand it, you met with groups in the area? A. Yes, sir.

Q. What is the way you performed your study? A. Yes, sir. Some were neighborhood groups. Some were Navy wives clubs; different civic organizations. Different organizations just in neighborhoods that might have come in. No definite organizations as such; just a group of people from neighborhoods.

Q. Now, you mentioned Navy wives' clubs. Obviously from the definition of Navy wives, you are talking about wives of people who are stationed here with the Navy? A. Yes, sir.

Q. Are these people from all over the community? A. I would say so. I have no knowledge of that but I would say they were pretty well representative throughout the country.

Q. You have lived in Portsmouth fifteen years? A. Yes, sir.

[15] Q. Does the Navy bring people here from all over the country? A. I would assume so, sir.

Q. Well, all right. In meeting with these groups were you able to glean from them or determine by meeting with them what the standards of this community were; this community?

In the community of which you were speaking, were there standards insofar as the display and portrayal of sex in books and magazines? A. I feel so, yes, sir.

Q. When you looked at the magazines and pictures to which I am referring, which we have in court today, did I not ask you to look at them with the standard in mind? A. Yes, sir, you did.

Q. The standard that you had come up with? A. Yes, sir.

Q. Mr. Holley, how old are you? A. Forty-five. My insurance age is forty-six.

Q. Your insurance age is forty-six; all right.

Have you, in your forty-five years, had occasion to read national magazines, for instance? [16] A. Oh, absolutely.

Q. You watch television? A. Yes, sir.

Q. You go to the movies? A. Yes, sir.

Q. Do you also read books? A. Yes, sir.

Q. Do you read magazines of different national publications? A. Yes, sir.

Q. Have you ever had occasion to go to other parts of the country to watch TV or read books? A. Yes, sir; throughout the East Coast, basically.

Q. Have you had occasion to see any Broadway plays or any plays in Chicago? A. I have seen one Broadway play.

Q. Any other plays? A. Only Little Theatre.

Q. Little Theatre in the area? A. Yes, sir.

Q. Have you ever participated in Little Theatre plays? A. Yes, sir.

[17] Q. Put on by the local amateur theatre? A. Yes, sir.

Q. Would you be able to tell me whether or not, in your opinion, based on your experience, the standard of this city and the area that you reviewed is essentially the same as that of the nation?

MR. DIETZ: I object. This man is not qualified to say what is the standard of the nation. I will not, by that objection, even admit or agree that he is qualified to say what is the standard for this community, and I think Your Honor should permit the respondent the right to

cross-examine this man, the type of voir dire examination, Your Honor, as to his qualifications before he should be permitted to voice any opinion on any subject.

MR. PIERSALL: If Your Honor please, Mr. Holley has testified as to his own personal research insofar as the local standard is concerned and he has said that he is a business man, [18] forty-five years old, who has been aware of the surroundings in this county, and he has visited other states and he has read books, magazines, watched television, seen movies.

We offer him not only as an expert but as a citizen who knows the standards of this community; who is also aware of the standard, of the national standard.

I think he should be able to testify as to whether or not, in his opinion, the standard of this community is any different from the national standard.

I think he can do this for what it is worth.

THE COURT: In qualifying him as an expert, I will allow Mr. Dietz to examine him if he wants to.

MR. PIERSALL: That's fine. I have no objection to that. I will say this, Judge, that what is an expert in community standards would be a difficult problem to solve, to say the least.

An expert in a national standard, to say what it was, what it is, that [19] would be an impossible task.

I think Mr. Holley would not have to be qualified as an expert necessarily to give his opinion based on his experience for what this is worth and for the weight that it might carry insofar as how the local standard compares with the national standard.

* * * * *

[21] MR. PIERSALL: I asked him if he thought the local standard was essentially the same as the national standard.

THE COURT: Answer that.

THE WITNESS: In my opinion, yes.

MR. DIETZ: These magazines we have at issue are not to be judged in comparison with Life magazine and Look magazine.

THE COURT: If you are qualifying a man as to the national standard, does that mean he has to travel through fifty states to explore the subject?

MR. DIETZ: I will answer the question as candidly as I can. I have been out to California recently and there they have a special statute saying that it is not a city community standard, it is not a county community standard, but it is a statewide community standard.

I might say that the statute has not been tested as yet to the Supreme Court of the United States, but pursuant [22] to that statute in the State of California, the Attorney General's office has selected a group of, I think, two or three men and has sent them over the entire state and kept them traveling throughout the state constantly, sampling the media so that they can be qualified to testify as to the community standard.

Now, one question that I could ask this man is has he ever been to California? Has he ever purchased a magazine in California? Has he ever been in an adult book store in California?

Mr. Holley, have you ever been in an adult book store? MR. PIERSALL: Your Honor, I object. We are not trying a state standard, as he is arguing, so one particular state is not of any importance.

THE COURT: We are getting off the track a little bit. You are trying to establish Mr. Holley as an expert, and, as I understand it, he has stated that the standard of the

area here that he has looked into and the national standard, as he recognizes it, are one and [23] the same.

MR. PIERSALL:

Q. What is your basis for your knowledge of the national standard on the subject? A. Through my travels on the East Coast and talking with people throughout the country that I have come in contact with, including people from California.

THE COURT: I am inclined to think Mr. Holley is qualified.

MR. DIETZ: May I have some voir dire examination of Mr. Holley?

THE COURT: You certainly may examine him, yes, sir.

MR. DIETZ: Thank you.

CROSS EXAMINATION

BY MR. DIETZ:

Q. You said you conducted an examination about five to seven years ago of materials that were supposed to be questionable as to obscenity, is that correct? A. Yes, sir.

Q. Were they magazines? A. Most of them were magazines, yes, sir.

Q. What other material was included? [24] A. Movies.

Q. About a year and a half ago or two years ago you also conducted another investigation? A. If you want an exact time on that—Mr. Piersall, when was Grayson Sandie's case?

MR. PIERSALL: I don't know, exactly.

A. About that period of time?

MR. PIERSALL: Something like that.

MR. DIETZ:

Q. Well, it's your testimony. A year and a half; two years ago? A. Approximately that, yes, sir.

Q. Was that involving magazines? A. Yes, sir.

Q. Movies, too? A. No. sir.

Q. Now, as a part of your claim to qualification as to the national community standards, you say you go to moving picture theatres? A. Yes, sir.

Q. Will you tell us, please, the names of the X rated motion picture films that you have seen in the year 1970?

* * * * *

[27] Q. All right. The question was this. Can you tell us how many X rated films, motion picture films you have seen in the year 1970? A. No.

Q. Have you seen any? A. I don't know, really. I doubt if I have seen any X rated.

Q. Have you seen any films like "Teresa and [28] Isabelle"? A. No, sir.

Q. Have you seen "The Fox"? A. No, sir.

Q. Have you seen, "I Am Curious, Yellow"? A. I have personally not seen it. I have talked to people who have, yes, sir.

Q. All right. What type of film in the year 1970 have you seen; the ones that are rated GP, General Public? A. I don't look at the rating, sir. If the movie looks good, I go. I have seen very few movies this year. MASH comes to my mind as being one I saw. I don't even know what rating it is though.

Q. I think MASH, I think children under seventeen may go if they are with their parents?

MR. PIERSALL: MASH is an R movie.

MR. DIETZ: I don't know. I didn't see MASH, by the way.

Q. If you were asked to voice your opinion regarding community standards in depiction of sex, would you include in your answer depiction of sex in motion pictures? A. No, sir.

[29] Q. Because you are obviously not qualified; correct? A. That is your opinion, sir.

Q. I am asking you, if in your own mind you consider yourself qualified in that field? A. Which field, sir?

Q. To voice an opinion on the community standards of the depiction of sex in motion picture films. A. That's correct.

Q. That you are not qualified? A. That's correct, sir.

Q. All right. Now, you testified on direct examination that about a year and a half or two years ago there were three books involved. A. Magazines.

Q. Magazines, all right. What were those magazines? A. I don't remember at this time, sir. I am sure it is in the record some place. As a matter of fact, I can get them. They are in my office. Beg pardon. They were state's evidence. I don't have the magazines.

Q. Were those magazines purchased, to your knowledge, from an adult book store? [30] A. To the best of my knowledge, it was not an adult book store. However, it was in the adult section.

Q. Were those magazines what are generally considered to be hard core pornography? Did they actually depict sexual behavior; fellatio, cunnilingus? Did they depict feliatio? A. No. sir.

Q. Are you familiar with that word, sir? A. No, sir.

Q. You just answered a question regarding that word. How could you answer the question without knowing? A. I answered the question prefaced to those names, sir.

Q. Are you familiar with the word cunnilingus? A. No. sir.

Q. You just answered a question containing that word, did you not, sir? A. No, sir.

Q. You did not answer the question? A. I didn't answer the question if it contained that word because I

am not aware of the meaning of that word, sir. There were two words [31] that you used at the end of a question. I answered the question.

Q. Well, I don't have Webster's International Dictionary with me, but the last time I was called upon to define that word to a jury I read it from Webster's.

The word "fellatio" means oral sodomy or placing of the mouth upon the penis to cause an ejaculation. Does that explain the meaning of the word to you, sir? A. Which word are you referring to?

Q. Fellatio. A. Yes, sir.

Q. Cunninlingus is also sometimes considered oral sodomy. It is the placing of the mouth upon the vagina. Does that explain the word to you? A. Yes, sir.

Q. Now, my question to you, which you answered before but which I don't think you understood fully, was did the three magazines that you were involved with a year and a half or two years ago have any photographs of fellatio or cunnilingus or sexual intercourse? A. No, sir.

[32] Q. Have you ever been in an adult book store in Portsmouth? A. No, sir.

Q. You have never been in an adult book store in the city of Portsmouth? A. No, sir.

Q. Have you ever been in an adult book store in the city of Norfolk? A. No, sir.

Q. Have you ever been in an adult book store in any other city? A. Yes, sir.

Q. Where? A. Washington, D.C.

Q. And when were you in this book store in Washington, D.C.? Approximately? A. Approximately 1947.

Q. 1947? A. Yes, sir.

Q. Do you recognize that the mores of our society have changed since 1947, sir? A. Yes, sir.

Q. Now, in response to an interrogatory from Mr. Piersall, you said you have talked with people from different parts of the United States [33] outside the Portsmouth area. What persons have you spoken with outside the Portsmouth area, from different parts of the country, regarding this material that we have at issue here?

* * * * *

MR. DIETZ:

Q. Yes. A. Please restate your question. Have you spoken with anyone outside the Portsmouth area regarding the books that we have here in issue as far as their conforming to community standards of [34] any other city than Portsmouth, Virginia? A. Yes, sir.

Q. How many other people have you spoken with? A. I guess a dozen.

Let me rephrase that. A dozen people that came back, that were out of the city. How many people I have talked to from other parts of the country that are not residents of the city that I have talked to in groups, I have no idea.

Q. But these people who were from other states, did you show them any of the materials at issue in this case? A. They were not available.

Q. So the answer is no, is that correct, sir? A. Did I show them the material?

Q. Yes. A. The answer is no.

* * * * *

[37] THE COURT: I don't see why the fact that this man has not actually been in the local adult book stores disqualifies him completely on the subject.

In the case you are talking about, the federal case, I don't know anything about it, about the facts. Maybe the man hadn't done anything, hadn't been in the book store, or hadn't made any other investigation.

Mr. Holley testifies he has gone into this on the Chamber of Commerce level in this entire Tidewater area of our state, and he has reviewed it very thoroughly on several occasions and has gone into it with people here from all over the country in various types of meetings.

I am going to overrule your objection and allow Mr. Holley to testify as an expert.

MR. DIETZ: May I note an exception to Your [38] Honor's ruling?

* * * * *

DIRECT EXAMINATION (Resumed)

BY MR. PIERSALL:

Q. Mr. Holley, in examining these books that we have here today and we have had for some time, did you examine each book? A. Yes, sir.

THE COURT: Excuse me. There was one other thing I wanted to put in the record in determining Mr. Holley as an expert for this particular case, [39] the nature of the case, in his testimony.

I wanted to add that although he hasn't been in the particular store from which these books came, it is my understanding that he has been in other magazine and newspaper shops and newspaper shops that sold similar type magazines?

MR. DIETZ: I take issue with you, Your Honor. He did not testify to that.

THE COURT: Did you say you bought other magazines?

THE WITNESS: The question was had I ever been in an adult book store.

THE COURT: Yes, that's right. I think that is the name of the one here.

THE WITNESS: There are similar ones or this gentleman (Pointing to Mr. Dietz) wouldn't be in

business, but the title, adult book store, I took it to be for adults only and had only this type of magazine.

The only one I was ever in was in Washington, D.C. in 1947, I believe I said.

Your Honor is correct. I have been in [40] other book stores, magazine stores that were not described as an adult book store.

MR. DIETZ: But had you ever been in a book store that sold magazines comparable to the magazines that we have at issue here? A. No, sir.

MR. DIETZ: That's the point; and your answer to that question is no; correct? A. Yes, sir.

MR. DIETZ: Your Honor, I wish you would take that and reconsider your ruling.

THE COURT: Let me hear from Commonwealth.

MR. PIERSALL: Did you say exclusively this kind of book?

MR. DIETZ: I didn't say exclusively that.

BY MR. PIERSALL:

Q. Have you been in books stores where these books were sold along with other kinds of books, newspapers, magazines? A. The magazine stores and book stores that [41] I have been in have never sold anything as bad as that.

MR. DIETZ: I object to the words "as bad".

THE WITNESS: That is my opinion, sir.

MR. DIETZ: That gives the background. I ask Your Honor to reconsider your decision in light of this qualification or lack of qualification that has just been made clear to the Court.

MR. PIERSALL: Judge, I don't think that makes any difference insofar as his qualifications are concerned.

THE COURT: Frankly, I can't see the fact that he hasn't gone into these stores of itself would disqualify

him as being an expert on a subject which he has made a study of.

MR. DIETZ: The point, Your Honor, and I don't mean to argue with Your Honor, but the point is if he hadn't made a study of it, he couldn't have made a study of it unless he had gone to different places and had seen–

THE COURT: If the material had been [42] brought to him by somebody else, what difference does it make? The fact he didn't walk through the door and by the magazines wouldn't make any difference, I wouldn't think.

Maybe I misunderstood him but I understood he had similar material before him, and that is what you all studied? A. Yes, sir.

THE COURT: How did you obtain the material?

THE WITNESS: A year and a half ago I obtained it through the Commonwealth's Attorney's office. Prior to that, some five years ago, the members of the committee purchased it from these different locations. Some of these members may have gone into an adult book store and purchased them. I would have to go back and look at each individual one's identification to see where they were purchased.

The question was posed was I ever in one, and my answer was no.

THE COURT: And you, being Chairman of that committee, you worked with that material?

[43] THE WITNESS: Yes, sir.

THE COURT: I overrule your objection.

MR. DIETZ: Over our objection, yes, sir.

BY MR. PIERSALL:

Q. You looked at each one of the books here? A. Yes, sir.

Q. Where did you look at them? A. In the clerk's office, I believe, in the old court house.

Q. Did you make more than one trip to that location? A. Yes, sir.

Q. Did you spend time looking at these books? A. Yes, sir.

Q. Did you make some notes insofar as what these books contained and your feelings about them? A. Yes, sir.

Q. Did you find any of the books which, in your opinion, well, let me rephrase that. Did you find any books which, in your opinion, would not be patently offensive in that investigation that–

MR. DIETZ: I object to the leading question.

MR. PIERSALL: Well, all right.

THE COURT: Rephrase your question.

* * * * *

[44] Q. Well, what is your opinion whether or not these books are patently offensive and that they violated the community standard in the display and portrayal of sex? A. The majority of them–

MR. DIETZ: I object to the question. Unless we can have some sort of an understanding that your Supreme Court of Appeals of Virginia will recognize that, I object to all questions along these lines put to this witness.

THE COURT: What is your objection?

MR. DIETZ: That he is not qualified to answer this question.

THE COURT: You have already noted your exception to his testifying at all.

MR. DIETZ: Yes, sir.

THE COURT: Because your position is that he is not an expert. I have ruled that in this particular instance and on this particular subject matter he is qualified to testify.

* * * * *

[45] MR. DIETZ: And the Supreme Court of Appeals would understand that I am objecting to each and every question and Your Honor is overruling my objection and I am excepting.

THE COURT: I can't overrule questions you might object to and I haven't heard. I am saying you can make your objection and later in the record if there is some question that you think is objectionable, then your exception would have been noted.

MR. DIETZ: I make my objection to this question, sir.

THE COURT: All right.

BY MR. PIERSALL:

Q. Do you remember the last question? A. No, sir.

MR. PIERSALL: Read the question, please.

COURT REPORTER: "Well, what is your opinion whether or not these books are patently offensive and that they violated the community standard in the display and portrayal of sex?

MR. PIERSALL:

[46] Q. What is your answer? A. The majority of the books did not meet the community standards.

Q. You say the majority. Which ones, in your opinion, did not violate community standards? A. There were some written in a foreign language which I couldn't interpret. I noted those.

There was one which I felt was not obscene, called "Continental Spectator," Volume 4. It is Number 9. I believe it is "Continental Spectator," Volume 4, Number 9; and three others I have marked as "Questionable" in my mind: "Ectasy," Volume 1, Number 11, "Daring Films," Volume 3, Number 5, "Black Silk Stockings, "Volume 5, Number 3."

The balance of the magazines that were in question I felt were, in my opinion, did not meet the community standard.

Q. All right. Did you find that any of these books, taken as a whole—let me ask you this. I will rephrase the question.

Did you find that these books, taken as a whole, appealed to the prurient interest in sex? [47] A. Yes, sir.

MR. DIETZ: I object. I don't think he is qualified.

THE COURT: I will let him testify as an expert on the subject. I think it is all tied together.

BY MR. PIERSALL:

Q. Did you find that any of these books, well, what is your opinion as to whether or not these books contained any redeeming social value?

MR. DIETZ: I object to that.

THE COURT: I overrule the objection.

THE WITNESS: In my opinion, the majority of them did not have any redeeming value, redeeming social value.

Q. The ones you noted, were there any others which, in your opinion, may have had some redeeming social value? A. Yes, sir. There were a group of them that had an insert in the middle that could be determined as a redeeming value, but the balance of the book was, in my opinion, below community standards.

Q. Do you know which ones you thought did have some redeeming social value? [48] A. Not without some study, sir.

Q. You don't recall the ones? A. I would have to check. I think it is those three that were mentioned that were questionable.

Q. Could you check it for us, please? A. I would have to look through the magazines.

THE COURT: Was it "Continental Spectator?

THE WITNESS: No, sir. That is the one that has want ads for all kinds of people, "Ectasy," "Daring Films," "Black Silk Stockings."

BY MR. PIERSALL:

Q. You think those were the three? A. I think those were the three that had the inserts that could be determined to contain some redeeming social value.

Q. Any others? A. No, sir. I will stand corrected on that. Frankly, this was done in July and my notes are a little bit cold.

Q. You say you stand corrected. What do you mean by that? A. That those are the three books in question as to those inserts. Do you want me to look for them?

Q. I don't know. I was going to see if I could find one of them right away. [49] A. "Daring Films," Volume 3, Number 5. This one you handed me is not the one. It was another one with the want ads in it.

MR. DIETZ: May the record indicate what the witness was referring to when he said, "This is not one of them"?

MR. PIERSALL: "Ectasy," Volume 1, Number 11.

THE WITNESS: It is one I questioned whether it might have redeeming social value.

BY MR. PIERSALL:

Q. You say it might have or it doesn't have? A. I questioned whether it may have redeeming social value.

THE COURT: Did you ever find the books you were looking for?

MR. PIERSALL: No, sir, I didn't. I, frankly, don't know how to do it in a practical way.

THE COURT: You have names of them written down?

MR. PIERSALL: Yes, sir.

THE WITNESS: "Continental Spectator" is one in my mind that is not obscene.

[50] BY MR. PIERSALL:

Q. And the other is "Ectasy," "Daring Films," and "Black Silk Stockings," which you indicated you thought may have some redeeming social value, right?

Is that what you said? A. Yes, sir.

* * * * *

CROSS EXAMINATION

BY MR. DIETZ:

* * * * *

[51] Q. Mr. Holley, would you define for the Court what you meant when you said that these books would not appeal to a prurient interest in sex? A. I said they would not. Are you talking about the exceptions I made?

Q. Yes, or that they would appeal to the prurient interest in sex? What do you mean by that? A. They would appeal to those who enjoyed lewd matter, depicting sex in a very objectionable way.

Q. That is your answer, sir? A. Yes, sir.

Q. All right. Will you define, sir, what you meant when you said that these magazines or, I think you said the majority of these magazines, went beyond community standards? What is the community standard? A. What is the community standard?

Q. What is the community standard you had in mind that was supposedly exceeded? A. In my opinion, the community standard is the depiction of nudity, both male and female, in various suggestive and lewd positions, which appears throughout most of the magazines.

[52] Q. Then I understand you, sir, if a book contains depictions of nudity, male and– A. Not just nudity, no, sir; suggestive positions.

Q. All right. Suggestive positions. Suggestive of what? A. Of sexual intercourse, sodomy, any of the items we are referring to.

Q. In any of these magazines did you see, sir, any photographs of fellatio? A. Define fellatio.

Q. I have before. A. Define it again.

MR. PIERSALL: I don't think that is so funny, Judge. I don't know what it means, either. I don't think it is of

any significance. We have looked at these books. I am sure, sir, that Your Honor looked at them.

I think what this man said, briefly and precisely, is that these books contained pictures of people nude in suggestive poses. I don't know, but he is suggesting sex and sodomy; whether you call it one thing or another.

[53] THE COURT: Mr. Dietz explained the meaning of the word a little while ago. Why keep using the same words? Why not use layman's language, if you want to? Either way is all right.

BY MR. DIETZ:

Q. Did you see any photographs of someone's penis in someone else's mouth? A. Quite suggestive of this, yes, sir.

Q. Suggestive, but you didn't see any photographs of a penis in someone's mouth? A. My studies show that the community standard objects to this being as closely suggestive as it was in these magazines.

Q. Mr. Holley, are you familiar with the term "hard core pornography"? A. Yes, sir.

A. Would you define that term for me, please? A. The actual showing of people committing the act of sodomy and the act of sexual intercourse and all of the actions which go along with the whole subject.

Q. Do you consider the magazines at issue here today as hard core pornography? A. No, sir.

[54] Q. So you didn't see any actual depiction of sodomy or sexual intercourse in these magazines? A. I answered that already, sir.

Q. What was your answer? I didn't catch it the first time. A. I said there were no pictures of the actual act. However, there were strong indications and suggestions that this was happening.

Q. Was happening, was about to happen or had happened? A. You can't determine that from a still.

Q. So what you are saying then it is left to your imagination? A. Yes, sir.

Q. And in your imagination, these acts were transpiring? Correct? A. No, sir.

THE COURT: What did you say?

THE WITNESS: I said no, sir. I am testifying as to a community standard, my understanding, Judge, and the pictures that were depicted did not meet the community standard.

This is my statement. I can't draw a conclusion of what has happened or about to happen.

BY MR. DIETZ:

[55] Q. And what was the community standard? A. I would say the community standard depends on what is actually presented, just as in my mind the "Continental Spectator" would not be pornography or obscene, according to the community standards.

I cannot now do I believe anybody can say in black and white this particular item, I beg pardon, this, in black and white words, is what a community standard is.

Q. You can't describe it but you know it when you see it; is that it? A. I know what is acceptable and what is not acceptable as far as community standard is concerned.

Q. Can you describe to the Court what is acceptable? A. I have already done that, sir.

* * * * *

[56] MR. DIETZ: If he said this exceeds community standards, I want him to tell me what this exceeds.

MR. PIERSALL: We object to this, Judge.

THE COURT: Mr. Holley hasn't been given an opportunity to tell us whether he can answer the question or not. Maybe he can define it.

Do you feel that you can define the community standard as you understand it after your studies?

[57] THE WITNESS: I guess I could put it in words, Your Honor. It is the publication in any form or media of nude and lewd actions whether on public display or not, depicting any of the sexual acts natural or unnatural sexual acts.

It would also include the display of any male or female sexual organs that were exaggerated; the display of nudity in and by itself would not be objectionable in many cases, but the display of the sexual organs, exaggeration of such, would be; if this is what you are looking for.

THE COURT: Mr. Dietz had asked you if you could define community standards as you understood it.

MR. DIETZ: I have no further questions, sir.

REDIRECT EXAMINATION

BY MR. PIERSALL:

Q. Would you say nudity in and of itself would violate the community standard? A. No, sir.

Q. Would you say nude males and females in the same picture would violate the community standard as you know it; just pictured together in one picture? [58] A. I would say no, sir. Thinking of nudes, legitimate nudists come on any type magazines.

Q. Did these pictures show more than that? A. Yes, sir.

Q. Did the pictures in these books show male and female nude together in positions or poses which suggested sexual intercourse? A. Yes, sir.

Q. Did they show them in poses which suggested sodomy? A. Yes, sir.

Q. Which means that with the male or the female placing his mouth against the genitals of the other party? A. Yes, sir.

Q. And is that what you define as a violation of the community standard? A. Yes, sir.

* * * * *

[59] DR. DONALD LEE MINGIONE, a witness called in behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PIERSALL:

Q. Doctor, state your name and profession. A. Donald Lee Mingione, physician, specializing in the field of psychiatry.

Q. Dr. Mingione, where do you practice your profession? A. In the City of Portsmouth.

Q. What training have you had leading up to your taking up this profession? A. I received my Doctor of Medicine at Creighton University, University of Nebraska, and I did my residency and internship in Jersey City, New Jersey, and at the Fellowship of Psychiatrists at the Institute of Living, Hartford, Connecticut.

Q. Are you now presently a member of any professional associations? A. American Psychiatric Association and a member of the Society for Study of Social Issues, [60] Neuro-Psychiatric Society of Virginia, and the Tidewater Psychiatric Society.

Q. Prior to your practice at this time have you taught in any schools? A. I was Assistant Professor Psychology at the University of Hartford and Clinical Assistant Psychologist at the College of Medicine.

Q. Do you occupy any positions within your profession at this time? A. I am President of the General Medical Staff at the General Hospital.

Q. Here in Portsmouth? A. Yes, sir.

Q. How long have you been practicing psychiatry in Portsmouth? A. Nine years.

Q. Pursuant to a request of mine did you examine certain books and magazines? A. I did.

Q. These were examined at your office, right? A. Yes.

Q. Do you recall the number of them? A. It was a very large number; in excess of three hundred and fifty volumes.

Q. Did you look at each book? [61] A. I did.

Q. How long have you been in the City of Portsmouth, Doctor? A. Approximately nine and a half years.

Q. Were you in the military service at all? A. I was a lieutenant-commander in the United States Navy.

Q. How long were you there? A. Two years.

Q. Prior to coming to the City of Portsmouth, where had you lived? A. New Jersey, Connecticut, Nebraska, and the State of Virginia.

Q. All right. I believe you have discussed with me the issues involved in this trial, have you not? A. I have.

Q. Insofar as these books are concerned, did you look at these books with any particular purpose in mind? A. With the view as to an attempt to give an opinion as to the response or the attitude of this community as to the nature of the material contained therein.

Q. All right. Are you a member of any clubs [62] or organizations other than professional ones in this area? A. Yes, sir.

Q. And do you serve on any boards in the community? A. Yes. I am a member of Kiwanis and of the Elks Lodge. Is this the type you mean?

Q. Yes, sir. A. I served on the Suicide Prevention Service Board. I worked with the United Community Fund, Kirk Cone Rehabilitation Center, St. Mary's Infant Home, United States Public Health Service Hospital in Norfolk.

Several others. Do you want me to continue?

Q. No, sir. I think that's fine. I wanted to establish your activities within the community in which you live.

Would you say that this community is a Navy oriented community? A. Somewhat.

Q. Is a large segment of our population Navy? A. Yes, sir.

Q. In fact, that they are members of the Navy or families of the Navy or ex-members of the Navy? A. Yes, sir.

[63] Q. And thus they come from all over the country, right? A. Yes.

Q. As a matter of fact, you came here with the Navy? A. That's correct.

Q. Now, I believe when you looked at these books, I asked you to determine whether or not, if you could, whether or not these books appeal to the prurient interest in sex and did you look at these books with that in mind? A. Yes, I did.

Q. Can you give us what your definition is of prurient interest in sex? A. Well, I think I would say that the intent is primarily to appeal to sexual arousement.

* * * * *

THE COURT: All right, Doctor. Will you [64] answer the question?

THE WITNESS: I will attempt to. I would say the appeal would be to—I think one definition leads to another, but to the more animalistic aspects and mechanical aspects of sexual behavior.

BY MR. PIERSALL:

Q. Animalistic and mechanical, is that right? A. Yes.

Q. Of course, you are not suggesting that sex in and of itself is bad at all? A. No way at all.

Q. Did you find that any of these books appealed to prurient interest in sex? A. I would say that the overwhelming majority, if not all. I have difficulty in recalling the specific number but I would say their appeal was not to anything other than I would view a prurient interest in sexual matters.

Q. All right. Let me ask you this. Did I ask you to determine whether or not any of these books would have any redeeming social value insofar as your experience and knowledge would lead you to make a determination?

MR. DIETZ: I object.

* * * * *

[67] BY MR. PIERSALL:

Q. Let me ask you this, Doctor. In your professional dealings with patients of yours, would it be necessary for you to talk to these people and discuss with them and aid them in [68] determining certain values which might be called social values, if I make myself clear? Would social values in any way be involved in your work? A. I think I mentioned before that one definition leads only to attempting to re-define others.

I am sorry, Mr. Piersall, I cannot grasp specifically what you might wish me to reply to.

Q. Yes. Well, it is a problem.

THE COURT: Let me ask you this, Doctor. What is your understanding of the meaning of redeeming social values?

THE WITNESS: That it would exert a positive effect for appeal to higher, more dignified, more human aspects of behavior versus appealing to behavior which would tend to demean and undermine human dignity.

THE COURT: All right.

MR. PIERSALL: I am thinking of something, Judge. I don't know whether it would be in line with what you are driving at or not, and you can tell me, maybe, Doctor.

BY MR. PIERSALL:

Q. When we are talking about social value, would anti-social value, well, would anti-social behavioral patterns be the reverse of social value? Would [69] that be involved in any way? I know you deal with people having what I have heard described as anti-social behavioral patterns. A. We might try this. Some of the people with whom I deal are in response to their own emotional behavior in conflict with society.

Q. And do you in your treatment of these people, diagnoses of these individuals, have to deal with definitions of social values and try to re-establish certain social values with these people? A. Trying to re-establish their more comfortable adaptation to society, the society in which they would find themselves in residence, I would say.

Q. If I were to ask you what redeeming social values would be, well, I will get myself into trouble with words here. Let me ask you this. What would you mean if you made the statement that these or any books are without redeeming social value? What would you mean by that?

MR. DIETZ: I object to that hypothetical question.

THE COURT: I overrule the objection.

MR. DIETZ: The doctor hasn't made that statement. Nothing in the evidence on which [70] he could base that hypothetical question.

MR. PIERSALL: I am asking him what is his definition of redeeming social values.

MR. DIETZ: I object to that.

THE COURT: All right. I thought I asked him that question a little while ago.

MR. DIETZ: You did, Your Honor.

THE COURT: I thought I did.

MR. PIERSALL: I think we have gone far enough to introduce this man.

THE COURT: The main thing of Dr. Mingione is the redeeming social value question?

MR. PIERSALL: Yes, sir.

THE COURT: Go ahead. Follow through.

BY MR. PIERSALL:

Q. Doctor, did you find any of these books to contain redeeming social value; even a modicum of social value?

MR. DIETZ: May I enter an objection?

THE COURT: All right.

A. In my opinion, they did not possess any redeeming social values.

* * * * *

[71] CROSS EXAMINATION

EXAMINED BY MR. DIETZ:

* * * * *

Q. Doctor, would you be good enough, sir, to define the term prurient interest in sex as you have used it here today? A. That its appeal is primarily to sexual arousal per se with no attempt to appeal beyond that.

Q. All right, sir, and have you in the year 1970 had the opportunity to go to any motion pictures, see any movies? A. I have not.

Q. When was the last time that you attended a motion picture theatre to see a movie? A. I would say the latter part of 1969, probably.

Q. All right. Then may I make the question in the year 1969 and up to the present time 1970, have you had the opportunity to attend any movies that were X rated or R rated? [72] A. No.

MR. PIERSALL: He already testified he hadn't been to a movie.

MR. DIETZ: He said in 1969.

THE COURT: He said at the end of 1969.

MR. DIETZ:

Q. Then, Doctor, you would not be aware of any of the prurient interest appeal of any of the movies that are showing all over the country that are X rated or R rated, would you, sir? A. I am not quite sure I understand what you mean.

Q. Were you aware that the R movies, motion pictures that are on display to the public for the price of admission, which are X rated or R, Restricted, for adult only, that have sexual themes in them? A. Yes, I was aware that such existed.

Q. But you have not seen any? A. I have not.

Q. You are not aware of the extent of prurient appeal contained in those sexual scenes? A. I am not.

Q. All right. Would you say, Doctor, that the depiction of a love affair of the lesbian type, [73] a love affair of the lesbian type as was shown in "Teresa and Isabelle" and the movie, "The Killing of Sister George," and as depicted–

* * * * *

THE COURT: Well, if you haven't seen the movie. I don't see how the doctor could hardly answer the question.

MR. PIERSALL: My point is–

THE COURT: You object to his even talking about the movies?

MR. PIERSALL: Yes, sir. They are not [74] relevant to this man's testimony.

* * * * *

[80] MR. DIETZ: Mr. Holley's description of the book was "not obscene."

MR. PIERSALL: That is a matter for the Court to decide.

MR. DIETZ: I understand but that is the way Mr. Holley described it.

THE COURT: Regardless of what Mr. Holley said, the doctor has testified to his viewpoint on the redeeming social value and that one point alone when he said the vast [81] majority, if not all, in his statement, had no redeeming social value.

MR. DIETZ:

Q. That is your testimony, is it not, Doctor? A. Yes, sir.

* * * * *

RICHARD MESSENGER, a witness called in behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. PIERSALL:

Q. State your name, please, A. Richard Messenger.

Q. Where are you employed? What is your line of business? A. I am owner of Messenger Printing Company.

Q. Is that a business here in the City of Portsmouth? A. Yes, sir.

[82] Q. Where do you live? A. The address?

Q. Are you a resident of the City of Portsmouth? A. Yes, sir.

Q. How long have you lived in the City of Portsmouth? A. All my life.

Q. How old are you? A. Forty-three.

Q. Were you educated here? A. Most of my education.

Q. The Messenger Printing Company, how old is that business? A. Almost twenty years.

Q. Twenty years old. Were you the founder of it? A. Yes.

Q. Are you married? A. No.

Q. I ask you to look at the box that we have here today. Well, I will ask you if you have looked at the boxes we have here today? A. Yes, sir.

Q. Have you looked at each one of them? [83] A. Yes; all that were in the office at the time.

* * * * *

Q. Do you have any experience in printing materials for other than the locality here? A. Yes.

Q. In what way? A. We do quite a large amount of government printing and we do a lot of work for offices whose home offices are not in this area but other states.

Q. What type of material are you engaged in printing? A. Catalogs, magazines, newspapers, commercials.

Q. Do you receive from time to time information and bulletins insofar as what you should and should not print? A. Yes, sir.

Q. In the field of obscenity? A. Yes.

Q. And have you attended any seminars or schools in this field? [84] A. Not as seminars or schools, but we have had meetings, printers, publishers.

Q. Insofar as the printing of obscene material? Was that the subject of those discussions? A. Obscenity, illegality of matters such as copying movies; things like that.

Q. And you are an auxiliary police officer, also? A. Yes, sir.

Q. How long have you been an auxiliary police officer? A. I will guess and say four years. I am not really sure as to the date.

Q. What is your rank? A. Captain.

Q. Are there any higher auxiliary police officers, higher ranking? A. No, sir.

* * * * *

[85] Q. And insofar as your activities in the City of Portsmouth are concerned, have you always lived in Portsmouth? Have you gone out of the city? A. The only time I was out was when I was in service and in Williamsburg at school and Charlottesville.

Q. How long were you in the service? A. On active duty, two years.

Q. In looking at these books, what was your purpose in looking at them? What did I ask you to do? A. You requested me to look at them and see if I thought they contained any redeeming social value or did they appeal to, I don't know whether you said my prurient interests or to the prurient interests.

[86] Q. And did you look at them with that in mind? A. Yes, I did.

Q. Do you know what the prurient interest in sex is? What is your definition of that term? A. Prurient interest would be an arousal of your sexual mores.

Q. Did these books in any way, insofar as you viewed them, appeal to the prurient interest in sex? A. Several of them most definitely did.

Q. Would you say that generally they did or generally they did not?

MR. DIETZ: I object to that leading question. He said "several of them."

MR. PIERSALL: "Several" might be all but one or just one or two.

A. Well, I think I can give you a more intelligent answer.

THE COURT: All right.

A. Several particular makers of the books, I didn't count the volumes of each, but several were definitely, in my opinion, obscene and did appeal to prurient interests.

MR. PIERSALL:

[87] Q. Did you say seven? A. Several titles; title X. I didn't count the number under each title.

Q. Do you have them written down? A. Yes.

Q. What were they? A. One is "Blazing Films."

Q.You say there were more than one? A. I don't know how many copies there were of each particular title. There could be ten or fifteen or three. I don't remember the exact number of each title.

MR. DIETZ: I didn't get that. What was the name? A. "Blazing Films."

MR. DIETZ: That is not one of the books listed on my list, Your Honor. A. That is one of them in those boxes.

MR. DIETZ: Excuse me. You are right. A. "Seekers." "Quickie." Why don't I read them all to you and you won't have to go through them one by one?

"Pendulum," "Private Films," "Over 21," and "Heads Up."

MR. PIERSALL:

[88] Q. Those were books you thought were particularly obscene? A. Yes, sir.

Q. You say they appealed to the prurient interest? A. Yes.

* * * * *

Q. Can you tell me what your definition of redeeming value is? Redeeming social value? A. Anything that would be beneficial, helpful, or in any way or would in any way benefit society.

Q. Did you find any of these books to have [89] redeeming social value insofar as that definition is

concerned? A. Some of them for an art student would definitely have redeeming social value.

Q. Like what, for instance? A. In my opinion, the female body is a beautiful thing when viewed as a normal beautiful body. To answer your question, some that I saw had certain parts of the body accented by motion or unnatural poses that, to me, were disgusting; but as an art student they would have redeeming values for figure studies.

Q. Those books which contained pictures of men and women together in poses suggesting sexual intercourse, copulation, or some form of sodomy, are you describing those as having redeeming features?

MR. DIETZ: I object to the leading question. A. I wasn't referring to that particular book at all.

MR. PIERSALL:

Q. Did some of these books have pictures like that? A. Yes.

Q. Would you say most of them had pictures like that? [90] A. Yes.

Q. Would you say most of them had pictures that–

* * * * *

Q. How many books had pictures like that? A. I can't give you a count. I don't remember the number. I would say the majority of the books were not obscene or did not appeal or would arouse the prurient interest. When I say the majority, more than half were not.

Q. Were not what? A. Obscene, in my opinion.

Q. You know the definition of obscenity? A. I said, "In my opinion."

Q. I am not asking you your opinion of obscenity. A. I am lost.

* * * * *

[92] Q. Did these books have pictures of people in poses suggesting sexual intercourse? A. Yes, sir; most definitely.

Q. Or suggesting sodomy? A. Yes, sir.

Q. Did they have pictures of the male or female genital organs as a central or focal point of the picture? A. Yes; most definitely.

Q. Were the organs accentuated or extended in any way? A. Yes.

Q. And would you say that that was an art work? A. No.

Q. I am showing you now "Tootsie," Collector's issue No. 1. These are the types of pictures I was asking about, where the female organ is the focal point. Would you describe that book as having the female organ as the focal point of the picture–

MR. DIETZ: I object to leading questions.

THE COURT: Ask him how he would describe it.

MR. PIERSALL:

Q. How would you describe it? [93] A. The book has twenty-six pictures. Twenty-four of them accent directly on the female genitalia.

Q. Would you say that that is an art work? A. No.

Q. I believe that's all. Answer Mr. Dietz.

MR. DIETZ: Your Honor, I will look through these books and see if I can find the issues of "Exciting," which was listed on the list.

THE COURT: Very well. Mr. Dietz, Mr. Messenger said it was in the box on the table.

MR. DIETZ: "Exciting" is over here? Oh, yes. That's fine; beautiful.

CROSS EXAMINATION

EXAMINED BY MR. DIETZ:

Q. Mr. Messenger, I show you one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen,

fourteen, fifteen issues of a magazine named "Exciting" and ask you if you would peruse those books, please. A. Yes.

Q. Mr. Messenger, you had the opportunity to view all of the issues of "Exciting." Those magazines which you have just viewed, is not the focus of the camera upon the genital area there [94] of the female involved? A. Not all of them.

Q. Not all of them? Some of them? A. Yes.

Q. In each magazine, is there not some photograph, generally the center fold, that has the emphasis upon the vagina of the female involved? A. I will answer yes.

Q. And when you were testifying earlier regarding the statement of the appeal to the prurient interest, you meant the appeal to your prurient interest? A. No, sir.

Q. You are shaking your head no? The record doesn't indicate a shake of the head. A. I said, "No, sir."

Q. Whose prurient interest were you indicating it would appeal to? A. Are we referring to these books?

Q. No. We are referring to your testimony regarding appealing to prurient interests. A. I should assume that the average young person after reaching the age of puberty and in that age zone, it would certainly be an arousal [95] for them.

Q. You say an average young person who has attained puberty– A. Already reached puberty.

Q. You attain puberty at twelve to fourteen, is that true, sir? A. In that area.

Q. And that is the person that you had in mind who would have a prurient arousal or prurient interest appeal? A. Not necessarily. That is one you asked me to name. I would say any average young male or female could be affected by them. Whether they would or not, I couldn't tell you.

Q. Any average young male or female. You mean any average young person? A. Yes.

Q. All right. You mean someone above the age of puberty; say fifteen, sixteen, seventeen? A. May I use the words "formative years?" That would be up to the age of eighteen or nineteen.

Q. It wouldn't go past nineteen? A. It could.

Q. I am trying to find out what you had in your own mind, sir, when you testified. [96] A. If you want me to generalize, you would force me to say up through twenty-one.

Q. All right. Up through twenty-one? In your opinion, sir, as you have been permitted to voice it in this case, these magazines would appeal then to prurient interests, say someone under twenty-one years of age; is that correct, sir? A. Yes, sir.

Q. Now, Mr. Messenger, were you aware that only adults were permitted into the Village Book Store where these books were seized or taken? A. Anyone over the age of eighteen.

Q. Anyone over the age of twenty-one, sir; that is adult. A. Agreed.

Q. Were you aware of that? A. No.

* * * * *

[98] Q. Mr. Messenger, you said you had received bulletins of what not to print? A. We received informative bulletins.

Q. On what not to print? A. That's right.

Q. Who disseminates these bulletins? A. There are several organizations in the printing industry and one of them is the National Association of Printers and Lithographers; various organizations like that who send these out.

Q. And they give you bulletins and tell you what is or is not obscene, in their opinion? A. No, sir, I didn't say that.

Q. Tell us what the bulletins contain. A. They contain information as to what is reproducible without repercussion. That could be legal for community standards.

Q. It does not attempt to limit obscenity? A. No.

Q. And that is what you used as the basis of forming your conclusions upon which you base your answers, your prior answers? A. No.

Q. What did you use as the basis for your stating before as to community standards and [99] redeeming values, et cetera, prurient interests? A. I am afraid I don't understand your question.

Q. Upon what did you base your answers that you gave in response to questions from Mr. Piersall that certain of these books would appeal to prurient interests or would not appeal to prurient interests, that certain of the books went beyond community standards or were without redeeming social value? A. In my business I have to have a fairly good knowledge of art because of the type of business.

In the courses that I have taken, various studies, and in my formal education and living in the neighborhood, this area, my whole life is what I base my opinions on.

Q. To inquire into your background, have you ever read Henry Miller's "Tropic of Cancer" or "Tropic of Capricorn?" A. I read part of one. I don't know which one it was.

Q. Did you not read the entire book? A. No.

Q. Did you ever read John Clellan's "Memoirs [100] of a Woman of Pleasure?" A. No, sir.

Q. Sometimes referred to as "The Autobiography of Fanny Hill"? A. Yes.

Q. In full or in part? A. In college, and in full.

* * * * *

Q. What year was that? It was in college? A. It has been a long time.

Q. It would be in 1949 or 1950? A. In that range somewhere.

Q. Mr. Messenger, have you ever been in the local adult book store? The store on High Street?

THE COURT: You mean the Village Book Store?

A. I only looked in. I didn't go through [101] the door.

MR. DIETZ:

Q. You mean you only looked from the outside? A. Yes.

Q. Have you been in an adult book store in Norfolk? A. Yes.

Q. Or Newport News? A. No; Norfolk.

Q. You have been in that store? A. Yes.

Q. Did you ever buy anything there? A. No.

Q. You just looked around? A. I was in the store.

Q. Did you see magazines comparable to the magazines we have at issue here for sale there? A. Yes, sir.

Q. Have you ever been in an adult book store anywhere else? A. No.

Q. When were you in the adult book store in Norfolk, approximately? Was it 1970, this year? A. No. Well, it could have been the last of [102] 1969 or the first of 1970. I don't remember exactly.

Q. Within a year? A. Within a year.

* * * * *

[104] MR. DIETZ: Before you recieve them, may I interpose an objection?

THE COURT: Yes, sir.

MR. DIETZ: My objection is to the entire group contained in the four cartons on the table and the objection is that these books were obtained unlawfully and illegally in that the Commonwealth's Attorney had issued a subpoena duces tecum for Mr. Frank Collier who is an employee of the Village Book Store to appear in court with these books and that subpoena that was issued when there was no pending proceeding while in this court.

The proceeding was not filed until after the subpoena was issued and although I was not present, I understand Mr. Collier appeared reluctantly with the books and intended at that time to exercise his rights under the Constitution of the United States and the 5th Amendment and to refuse to deliver the books but that while Mr. Collier was taken into one court room, the books were then taken [105] by some court official or bailiff or sheriff, I don't know, I wasn't present, but the point I am trying to make clear in the record is that they were taken from Mr. Collier against his will; they were not voluntarily submitted.

They were only brought to the court building pursuant to the commands of the subpoena duces tecum which was issued when there was not any pending court action, and, therefore, we object to their admission in evidence. That is the ground.

* * * * *

[106] THE COURT: Yes. He told me then he was leaving the firm he was with within a week and going with the City Attorney's office in Norfolk, and he said something about the box that morning and the books were brought to court as they should have been and were impounded at that time, so I overrule your [107] motion, Mr. Dietz. Note your exception.

MR. DIETZ: Yes, sir. Thank you. You overruled my objection. May I have an exception to Your Honor's ruling?

THE COURT: Yes, sir. The books in Box No. 1 will be received and admitted into evidence and identified as "Commonwealth's Exhibit No. I."

Now, mark another box No. 2. The magazines therein will be admitted into evidence and identified as "Commonwealth's Exhibit No. 2."

There is a third box. Mark that, of course, as No. 3, and Box No. 3 containing magazines will be received and admitted into evidence and identified as "Commonwealth's Exhibit No. 3" and Box No. 4 will be received and admitted into evidence as "Commonwealth's Exhibit No. 4."

MR. PIERSALL: I believe that's it. We rest.

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[108] MR. DIETZ: At this time, on behalf of the Respondent, I move the Court to strike all the evidence. I believe that is the terms of the customary motion. Some places they call it a motion for a judgment, rather a motion for judgment or in some places they call it a motion for directive verdict.

We have no jury but I am sure Your Honor understands the gist of what my motion is and the points that I would raise is that the state, the Commonwealth, has not made our a prima facie case and that we have not had any testimony regarding the obscenity of the books, and, Your Honor should, as a matter of law, rule that the books are not obscene.

As a matter of law and as a matter of fact, Your Honor should rule that the books are not obscene.

Testimony has been introduced on behalf of the Commonwealth to the effect that some of the books have redeeming social value.

I know Your Honor is very familiar with the definition of obscenity which we have in the Supreme Court, and there has been no showing that these books are utterly without [109] redeeming social value and that the books did not conform with so-called contemporary standards, which I think should be a nationwide community standard and not just a standard for the City of Portsmouth, and, therefore, Your Honor should find all the books constitutionally protected by the first amendment of the Constitution of the United States of America.

* * * * *

[110] THE COURT: I think Commonwealth has made out a sufficient case. If we had a jury, it would go to the jury. I overrule your motion to strike.

* * * * *

[111] DR. WILBUR A. HAMMAN, a witness called in behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. DIETZ:

Q. State your name and your address, please. A. Dr. Wilbur A. Hamman. I live in Arlington, Virginia.

Q. And you are a Doctor of Medicine, are you not, sir? A. That is correct.

Q. And you specialize in psychiatry? A. That is correct.

Q. Doctor, would you state what institutions of higher learning you attended and what degrees you hold to have obtained your Doctor of Medicine? A. I graduated from Chicago School of Medicine in 1955. After a year's rotating internship I did my first year of psychiatric

residency at Crownsville Hospital in Maryland and I did my last two years in psychiatric residency at Central State Hospital, Petersburg, Virginia.

[112] For half the time I was at Crownsville and the entire time I was at Central State Hospital I was Chief of Maximum Service, and in that capacity was in charge of the evaluation of all patients sent to that hospital by the courts in Virginia for pre-trial observation.

Following that time, I went to the Washington metropolitan area. I have been on the staff of St. Elizabeth's Hospital. I have been in private practice since 1961.

Q. While you were on the staff at St. Elizabeth's Hospital, was there a period of time that you were assigned to the criminally insane division, so to speak? A. Yes. I was assigned there up until about a year and a half ago. First I was a staff member. Then I was a training officer. As training officer, I was in charge of the supervision of resident psychiatrists, that is, doctors who were taking the specialized training in psychiatry, and my sub-speciality was forensic psychiatry.

I supervised their evaluation of criminal patients and I conducted seminars in forensic psychiatry or psychiatry and the law.

Q. Doctor, are you also engaged in the [113] private practice of medicine, specializing in psychiatry? A. Yes.

Q. In which state or states? A. I am licensed in Maryland and Virginia.

Q. Have you ever appeared in any courts, federal or state, as a witness and been qualified as an expert witness? A. I have appeared in the state courts of Maryland and Virginia. I have appeared in the federal courts of Ohio, Maryland, District of Columbia, Virginia, North and South Carolina, and I have also appeared in

court martial proceedings in Norfolk and Saigon, Vietnam.

Q. Can you tell us how many times you have been called to testify in court? A. Well over two hundred, I imagine.

Q. And have you testified in obscenity cases prior to this? A. Yes.

* * * * *

[114] MR. DIETZ:

Q. Doctor, have you had opportunity to examine the exhibits which are contained in the cardboard cartons on the table in this court? A. Yes.

Q. Doctor, based upon your professional experience, can you give us an opinion whether or not the magazines contained in those boxes would appeal to the so-called prurient interest in sex?

* * * * *

MR. DIETZ:

Q. Doctor, would you define prurient interest in sex for the Court, please. A. Prurient interest, as I understand it, implies a more than just a normal sexual arousal in the on-looker.

[115] It also implies a certain degree of unwholesomeness, shamefulness.

MR. PIERSALL: Unwholesome or wholesome? A. Unwholesome, a certain morbidness; a type of arousal in the so-called reasonably normal human being.

MR. DIETZ:

Q. Doctor, to prepare yourself for the many times you have testified in these obscenity cases, have you read and studied the definition propounded by the Supreme Court of the United States in the case of Roth versus United States? A. Yes, I have.

Q. And have you, this morning, reviewed that definition again by re-reading the definition in the case of Roth versus the United States? A. Yes, I have.

Q. And you feel that you have a full understanding of the meaning of the term "appeal to prurient interests"? A. Yes, sir.

MR. DIETZ: Your Honor, I submit that the doctor is qualified to answer these questions.

THE COURT: Doctor, do you agree with [116] this definition of prurient interests? "Given to or springing from lascivious thoughts."

A. That is such a circular definition. I agree with it but I think it is kind of a meaningless definition. It is circular.

I can never go back—I can't pronounce that word—and define lascivious thoughts from prurient interest thoughts.

THE COURT: That is from my Oxford Dictionary.

A. They are very circular. They define one in terms of the other and the other in terms of the first one. I think in general what I said is consistent with that definition; yes, sir.

THE COURT: All right. I think you laid the proper groundwork for the doctor to testify.

MR. DIETZ:

Q. Now, Doctor, can you give us an opinion whether or not the items contained in these cardboard cartons, the magazines contained in those cardboard cartons, would appeal to the prurient interest in sex? A. It would not, in my opinion.

[117] Q. Upon what do you base that opinion, Doctor? A. My own reaction to it since I see myself as a reasonably well-put together person. Also, the reaction of patients of mine to whom I have shown this stuff to find out what their reaction to it was and also to friends of

mine, to staff members at St. Elizabeth's Hospital when we have looked over these books prior to some other types of hearings and also in relation to my basic knowledge and understanding of human behavior as a psychiatrist.

* * * * *

[118] Q. Doctor, would these magazines in the four cardboard cartons go beyond the contemporary community standard portrayal of sex? A. May I qualify that answer?

* * * * *

MR. DIETZ:

Q. Doctor, what, if any, qualifications would you have to voice an opinion regarding community standards in sex? Do you go to any movies? Do you have an opportunity to view magazines and other literature? Do you read books? Would you explain to the Court your background, sir. [119] A. Well, I think I have seen a few movies recently—well, I don't like the movies that are being made. I think the acting is poor, et cetera. I don't read that sort of thing.

However, I do read science fiction, and I was looking for a certain issue of "Fantasy" and "Science Fiction," which I finally had to write to New York for recently, and I spent one morning looking for this issue and went into about fifteen book stores in downtown Washington.

I would say ten of the fifteen stores had books much like that on the street, in front of the store, and in the store.

Q. Doctor, would this material then go beyond what materials you saw in book stores in the District of Columbia area? A. No. It was the same.

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A. I have looked at enough of these books and [120] looked at enough of the type in the book stores for Mr. Dietz in the past so when I see the cover, I know what the contents are.

The content is boringly the same.

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MR. DIETZ:

Q. And your answer, sir, to the question of whether or not these magazines would exceed the contemporary community standard is what, sir? A. Based on my inadvertent search of downtown Washington, it does not go beyond the community standard.

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[122] MR. DIETZ:

Q. In your perusal of these magazines, can you voice an opinion as to whether or not they have any redeeming social value?

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[123] THE COURT: May I ask you to have him define redeeming social values?

MR. DIETZ: Yes, sir.

A. That is has some use; that it has a positive use, shall we say? In fact, I think all of life could be looked at whether it is useful or not.

Some things are negatively useful. In other words, they are the opposite. Some things are positively useful to a greater or lesser extent.

MR. DIETZ:

Q. And in your opinion, sir, would these [124] magazines that are contained in the four cardboard cartons of exhibits have any socially redeeming values? A. They do have a limited usefulness, and I can give specifics.

Q. Would you, sir? A. Yes. It is not common, but uncommon, that a couple where there is a bit of a problem with impotency or frigidity and a little bit of embarrassment maybe between the married man and woman may, if they will look at some of these books there, arouse them or get them in a frame of mind where they can go on to a satisfactory sexual experience with full satisfaction to both the man and wife.

I will say I know a number of cases where that has been used in this manner. There are situations at stag shows where there is a certain positive camaraderie between the men there, and they have some laughs, because I think that is about all it is good for, from the standpoint of the stag shows, the laughs out of it; a certain togetherness is brought out about these, a feeling of unity.

These are two examples that I would give. [125] The first example that I gave, it is a useful thing for a certain minority of people.

Q. All right.

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CROSS EXAMINATION

EXAMINED BY MR. PIERSALL:

Q. Taking them in reverse order, Dr. Hamman, you say they have some redeeming social value, these books. Have you looked at these books, by the way? A. Yes.

Q. Every one of them? A. No, of course not.

Q. You say, "Of course not." You were testifying about each and every one of these books, and you haven't looked at every one of them? How many have you looked at? A. Maybe fifteen or twenty.

Q. Fifteen or twenty out of some three hundred. Which box did you look into, sir? A. I don't even remember. They were on top of the box.

Q. You looked at them here today? [126] A. Yes.

Q. Not before today? A. As I say, all of these books are pretty much alike.

Q. Just answer my question. A. I am.

Q. And I am asking if you looked at these before today? A. Those very books–

MR. PIERSALL: Please instruct the witness to answer the question.

THE COURT: Answer the question. It is perfectly clear.

MR. PIERSALL:

Q. Have you looked at these books today? A. I am not sure you mean those books with that piece of paper and–

Q. I asked you if you looked at the books. You said fifteen or twenty. Have you looked at them before today? A. No.

Q. What time did you arrive in Portsmouth? A. 10:30.

Q. And how long did you spend looking at these books? [127] A. Ten minutes.

Q. Ten minutes? I see. All right. As I understand it, you say these books have redeeming social value; that they would cause sexual stimulation or arousing in those few people who may have problems in that regard, is that right? A. This can be a result, yes.

Q. In other words, you say then, well, would you then, as a psychiatrist, advise some of your patients to go out and purchase these books if they come to you with that type of problem? A. No.

Q. You would not? A. No.

Q. You wouldn't say that these are books of any medical value, that kind of thing, is that right? A. I wouldn't prescribe it, but I wouldn't try and discourage anyone from looking at them, either.

Q. Do you know what hard core pornography is? A. I have a general idea.

Q. Would you say these are hard core pornography? [128] A. No.

Q. Would you say these same individuals who have difficulty in becoming sexually aroused might get the same result from viewing hard core pornography? A. I guess it is possible.

Q. So then hard core pornography has redeeming social value, right? A. You said something I didn't necessarily say. I suspect you can find redeeming social value in just about everything.

Q. No. I said you can find redeeming social value in just about everything; not me. A. You have a lot to learn.

Q. I hope I don't learn it. A. I suspect in just about in many forms of activity in some way, in some area, something about it, some redeeming feature can be found, yes, sir. Whether this be a redeeming feature enough to allow it to exist is something else.

Q. The Supreme Court has said an item must be utterly without redeeming social value. In your definition nothing would be utterly without redeeming social value, is that right? A. I wouldn't say nothing. Only a fool [129] would say that.

Q. I thought you said that. A. I said very few things would have utterly no redeeming value.

Q. But you said hard core pornography would have some redeeming social value? A. I suspect it would be, yes.

Q. So you would allow hard core pornography, is that right? A. No, it is not right. I didn't say yes or no whether I would allow it.

* * * * *

MR. PIERSALL:

Q. Insofar as contemporary community standards and insofar as representation of sexual matters is concerned,

are you saying that these books do not go beyond the customary limits of candor in the representation of sex? A. You mean by that what I think should be the customary candor or you mean what can be purchased in any big city?

Q. You are the witness and you are testifying [130] as to community standards. I ask you whether these books go beyond the customary limits. A. What can be bought in most books stores of this community, no, they don't.

Q. In what part of the country have you perused these books? A. I have not perused but have only seen the covers of books in New York and in Baltimore but I have talked with people who have.

Q. Are they here today? A. No, they are not.

Q. Then you can't testify to that. You say these books can be useful for married couples. Would you suggest that they might also be used for unmarried couples? Do you think that that would be beneficial to society? A. If they are having a reasonably healthy sexual relationship, why not?

Q. This book is called "Sumpin Different"; no volume number that I can see, but it is put out by Tudor House.

There are three pictures on a two-page opening here where it shows, apparently it looks like four people in various poses, standing all around each other. Would you suggest that that is [131] the normal activity that a person should conduct themselves and become involved in? Is that healthy? A. For this type of activity? It certainly is not healthy. It is rather pathological.

Q. Thank you very much. You say all these books are pretty much alike, is that right? A. No. Some of them have two men and some have two women. Some have a man and woman and some have groups.

Q. This particular book in the same box is called "Throttle." I don't see a volume number on this, either.

This is printed by, well, it has NTC down at the bottom. I don't know the printer. What type of book would that be, or rather, what type of person would that be directed to in our society? A. This is a picture of men with their genitals exposed. This is directed towards homosexuals whom I do not consider normal humans; therefore, the law of obscenity does not apply to them.

Q. Does not apply to them? A. Not directly to them, no.

Q. Then an adult book store, where everybody can come in, not just homosexuals, is all right? In [132] other words, these books are not just restricted to just homosexuals; anybody can buy them? A. Certainly. I assume this is the case that anyone can buy it, but my point is that by and large it would be the homosexual who would probably buy that and who might get some arousal.

Most homosexuals wouldn't be aroused by that, either, when you get right down to it; but I was simply pointing out that, as I understand the obscenity rule, that it has to arouse a prurient interest within a reasonably normal individual.

The fact that it might arouse a prurient interest in a homosexual, a psychopath, does not make it obscene.

As a matter of fact, if that were the case, you would have to outlaw darned near everything because a sexual psychopath could be sexually aroused from seeing children's underwear in a catalog, and he would cut out pictures of children in underwear and collect them and put them around his room and masturbate while looking at the pictures.

This is a sick person, so I don't think we can judge community standards or what is good or bad for other people by what a psychopath thinks [133] of it.

Q. I don't think so, either. You said these things would appeal to the prurient interest of one but not another? A. Prurient interest is the definition of a particular type of interest. Now, one person might become quite excited by something which appeals to the prurient interest and another may not.

Q. I am not talking about degrees in pleasure that different people get from this kind of book. I don't think that is the issue. I am talking now at this point about the prurient interest and I believe you testified that these books do not appeal to the prurient interest, is that right? A. In my opinion, they do not.

Q. What interest do they appeal to? A. Curiosity, maybe a mild sexual interest.

Q. All right; the mild sexual interest. Would I be wrong in saying that is a prurient interest? A. I believe you would, yes.

Q. A prurient interest would be an interest which is an unwholesome interest in sex or, as you define it, is that right, or a lascivious interest? A. Yes, sir; unwholesome, lascivious, shameful [134] than just an arousal.

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MR. PIERSALL:

Q. When you say prurient interest, are you talking about from the standpoint of the person who reads it or the standpoint of the magazine, what it is directed to appeal to? A. I have been talking about it from the standpoint of the person who reads it, yes.

Q. Don't you think we should, well, from the standpoint of the magazines or the books themselves, are they not directed to appeal to a certain type of interest? A. Of course they are directed to appeal to [135] a certain type of interest. They would have to be.

Q. And they are directed to appeal to an interest in sex, obviously? A. Probably to some extent. You see, now I would have to have interviewed the people who published the magazines because you are talking about their intent or motive, and in one case I have–

Q. Let me ask you this. I will show you the same book, "Sumpin Different." Will you tell me what other interest that could appeal to?

This could be the same page, but this shows four people on a bed. I really can't tell whether they are men or women except in certain cases, but in those cases where the genitals are exposed, it appears to be a couple of men, maybe a woman, but what do they appear to be doing there? They are all naked on a bed with the hands and faces in various places.

Do you think that appeals to the sexual interest or not? A. Are we talking about the looker or–

Q. I am talking about the sales themselves. What are they directed to? [136] A. I guess to the sexual interest. In my looking at it, and to most people I have talked to, looking at it, it doesn't arouse sex at all but I think it is rather disgusting.

Q. You would say the same thing about hard core pornography? A. Yes.

Q. You would say hard core pornography doesn't appeal to prurient interest? A. I don't think hardly anything that is written applies to the prurient interest, well, if we consider prurient in terms of shameful, unwholesome, and is much stronger than the average sexual appeal.

Q. Nothing that is written would appeal to the prurient interest? A. Little is. Writing does not have that much influence.

Q. I am talking about pictures. A. Well, anything that is published.

Q. That's all.

REDIRECT EXAMINATION

BY MR. DIETZ:

Q. Doctor, in the magazines before the Court, have you had an opportunity to view similar [137] editions in Washington, D.C.

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[138] A. Well, there are several standpoints. One, all this stuff is pretty much alike. It is just different poses, different people doing the same type of poses.

It is terribly repetitious. Two, Mr. Dietz told me, and I consider him an honest man, that I have looked in the past at a different copy of those same books, magazines, that are in those boxes, in his office.

* * * * *

A. Precisely; the same book in his office, a different copy of that same book is what I am trying to say.

* * * * *

MR. DIETZ:

Q. Doctor, in these magazines that we have at issue here today, particularly the book that you [139] were shown, "Throttle," which was supposed to be directed towards homosexuals, did you see any picture of the male penis in erection? A. No, I didn't.

Q. Did you see anything that would indicate arousal, any male penis at aroused rigidity? A. I commented on that. No, I didn't, and I commented on that to you as we were looking through them that obviously the people making the pictures were not sexually aroused or the men would have had erections.

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[141] MR. DIETZ:

Q. Doctor, would these lead to any anti-social activity, and what do you mean by anti-social activity?

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A. I assume by that that you mean sexual activity that is against the law or against the mores of society such as rape, arson, connected [142] with sexual arousal, exposure, voyeurism, that sort of thing.

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A. Reading this type of literature, looking at it, does not cause a person to go out and commit acts that he otherwise would not go out and commit.

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[145] MR. DIETZ:

Q. Doctor, are there any pictures of fallatio, cunnilingus or coitus in these magazines? A. No. May I enlarge upon my answer a little bit to Your Honor?

THE COURT: Yes, sir.

[146] A. I believe when you start, and I don't mean pictures of people with a whip. I think you have to depict it more gracefully through the written word.

When you start to combine or treat the sexuality with rather sick, sadistic stuff like the Mickey Spillane example I gave, then I think you are bordering on something that might arouse something unwholesome in the otherwise normal guy.

I think the unwholesome combination of violence and sex probably comes close to being objectionable under those obscenity standards as anything else.

I don't have other examples in mind except the one I gave.

THE COURT: But, in your judgment, the answer to the question I propounded before and we got off on the

prurient interest part of it, it is my understanding that your testimony is that the magazines in question are not obscene?

A. In my opinion, they are not.

MR. PIERSALL: I have a question.

RECROSS EXAMINATION

EXAMINED BY MR. PIERSALL:

Q. You said there were no pictures of coitus or cunnilingus or anything like that? A. None that I saw.

Q. What are they doing right here? I am showing you an issue of "Swap," Volume 4, No. 1, put out by Pendulum Press.

Can you say that they are not involved in an act of coitus or sexual intercourse? A. The only place where they could be involved in an act of coitus–

Q. You have to get a magnifying glass, don't you? A. You really would.

Q. Isn't that a picture of a man naked laying between the legs of a woman, also naked? A. Yes.

Q. Can you say they are not involved in an act of coitus? A. They could be and they could not be. It really doesn't–

Q. Why would they be in a situation like that? A. Who knows? It doesn't mean they are having [148] coitus. There are magazines showing coitus, no doubt about it, but that picture wouldn't stand up in a court of law.

Q. Isn't that the general position that would lead you to believe that is what they were doing? A. Yes.

Q. Would you believe they were doing something else in that position? They wouldn't be reading a book, would they? A. Well, maybe some people have odd reading habits.

Q. What would you say was going on in this picture? Let me describe it for the record. The man has his back

to the wall and a woman is facing him with her head in the area of his privates and you cannot see his privates. What would you say they were doing? A. This is suggestive certainly of an oral—well, it doesn't show it happening.

Q. What does it show happening? You are saying unless you see a close-up picture of an actual insertion or penetration then you can't say it is happening, right? A. It seems to me, as a lawyer, that should [149] be very evident to you.

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REDIRECT EXAMINATION

EXAMINED BY MR. DIETZ:

Q. In this magazine "Swap," Volume 4, No. 1, which was shown to you by Mr. Piersall, in any photograph do you see a man's penis in the state of erection? A. No.

Q. What is the condition of the male penis in those photographs? Would you describe it as flacid?

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[150] MR. DIETZ: Your Honor, Mr. Piersall has attempted to show that the photographs depict coitus and I don't know, well, let's say I don't know how a man, from my own experience, can commit coitus with a flacid penis, and I believe it is only fair on redirect examination that I bring this back out and have it in the record but if Your Honor has, by your viewing of these books, if Your Honor has already determined the issues to be decided—

[151] THE COURT: I don't want to hear any testimony from the doctor on that question.

I can't see where he would have one thing to offer the Court.

MR. DIETZ: I think the thing for me to do, the proper thing then, is to make my exception to Your Honor's ruling and then sit down and the doctor do the same.

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DR. DONALD WILLIAM NACHAND, a witness called in behalf of the Respondent, having been first duly sowrn, was examined and testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. DIETZ:

Q. Doctor, state your name and address, please. A. Donald William Nachand, Cambridge, Maryland.

Q. You are a doctor of what? A. Doctor of Philosophy and Psychology.

Q. Doctor, where are you employed? A. Eastern Shore State Hospital.

Q. What do you do at Eastern Shore State Hospital? A. I am Chief of the Department of Psychology.

Q. Doctor, what institutions of higher learning did you attend to obtain your degree in psychology? A. Bachelor degree in psychology, University of Louisville, Master's degree, University of Chicago; philosophy, University of Chicago.

Q. How many years have you been engaged as a Doctor of Psychology? A. I practiced for twelve years.

Q. In what state? A. After my doctorate, in Illinois and Indiana and in Maryland.

Q. Doctor, have you done any work involving [153] pornography? A. Yes, because of the human sexuality being rather the central interest and especially in my specialty, clinical psychology, I followed it to some degree all along in the past couple of years and I have devoted a substantial portion of time particularly to following the recent and older research findings and scholarly papers in the field.

Q. Have you been on any commissions or rendered any reports, any papers? A. No.

Q. Doctor, have you had occasion to testify in any courts, either state or federal courts, on this subject? A. Yes, I have.

Q. And how many courts and what states? A. United States District Court of Maryland, the state courts in California, state courts in Indiana, state courts in Kentucky. That's all.

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[154] MR. DIETZ:

Q. Doctor, have you had occasion to peruse the magazines that we have at issue in this case? A. Yes.

Q. And based upon your experience as a psychologist, can you voice an opinion as to whether or not these magazines would appeal to the prurient interests of the average individual? A. Yes, I have an opinion.

Q. What is that opinion?

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A. My opinion is that they do not.

MR. DIETZ:

Q. All right. Doctor, in your review of these magazines, have you seen any magazine that depicts fallatio or cunnilingus or coitus? A. No, I didn't see any.

Q. Doctor, in your opinion, would these magazines exceed the limits of the contemporary [155] community standards of materials depicting sex? A. No, I don't believe that they do.

* * * * *

MR. DIETZ:

Q. Doctor, in your opinion, do these magazines have any socially redeeming value, and if so, what value and what do you base your opinion on? A. I believe they probably do have some socially redeeming value.

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A. O.K. I don't grasp the difference, but we will say redeeming social value then. I base my opinion on several

sources. In clinical [156] experience, I have had the same experience previously alluded to with the usefulness of these magazines in assisting couples who have some problem with their sexual relationship.

Also, from the scholarly point of view, one of the studies commissioned, paid for by the Presidential Commission, asked people what their approach–

MR. PIERSALL: Are you testifying from your own experience? A. I am testifying as a scholar based on professional research.

Q. Your research? A. No.

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[157] Q. You may answer. A. One of the researchers reported in the President's Commission Report, I asked individuals sampled across the country what their personal experiences had been with a wide variety of sexually erotically related materials, and I think, if I recall correctly, that the two most commonly given answers were entertainment, well, three, I suppose, the satisfaction of curiosity and information, perhaps; curiosity and information are rather the same thing.

That, I think, is a matter of socially redeeming value.

[158] Also, in my experience, sexually explicit materials are a very traditional, have been a very traditional part of the masculine culture in the United States and are a source of the shared humor and shared bon ami among men. I think that is probably a socially redeeming value.

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[159] Q. The magazines contained in the cardboard cartons on the table and on the floor, do they constitute hard core pornography, Doctor? A. Not in my understanding of that term.

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[160] EXAMINED BY MR. PIERSALL:

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[161] Q. Have you looked at copies of these books? A. I have looked at a large number of them. Let me explain in three ways. When I was down here when this trial date was set some two months ago, whatever it was, and at that time Mr. Dietz provided me with a sampling of, I think, some fifteen to twenty.

Then today, as I looked through there, of course, I passed over all those that I had seen in the sample. I looked at about another thirty [162] and also passed over a very substantial number that I had reviewed for other cases, in other locations, that is identifying them simply by the cover and title, assuming that the contents were the same, so altogether, I am reasonably familiar with them.

Q. With the substance of the books? A. Yes; a very large number of them.

Q. But you have not looked at each and every book? A. Correct.

Q. Would you say you have either directly or indirectly looked at half of them? A. What is the total number?

Q. About three hundred or two-hunred and fifty. A. Perhaps I have.

Q. Perhaps you have? A. Yes.

Q. How many adult book stores have you actually been into? A. Some twenty-five to thirty, I suppose.

Q. Where? A. In Virginia, and–

Q. Were they all around? [163] A. Pretty much all around. It included the East Coast, West Coast, Midwest. I can give you the states if you want them.

Q. I just wanted to know if it were more than the Washington area. A. Oh, yes.

Q. And you have visited these stores for the purpose of purchasing things? A. No, sir; for preparation.

Q. For not only this case, but for other cases? A. That's right.

Q. You testified earlier that you had testified in various courts. Those courts, I don't know if I wrote them all down, but the courts that you testified in in other states, Kentucky, Maryland, Virginia, Indiana, California. Were they all relevant to this type of case? A. Yes.

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[164] Q. How many books other than the ones in this case have you actually looked at and perused? A. Of this type?

Q. Yes. A. Several hundred.

Q. Several hundred? A. Yes.

Q. And have you attended many X rated movies? A. I have attended, I see it as a duty to do so, so I try to attend four or five, well, that is a strange way of putting it, but four or five every season, but they don't come in season; perhaps a dozen or so a year.

Q. Do you do that purposely to prepare [165] yourself? A. Yes.

Q. In other words, you are constantly testifying in this kind of case, right? A. Hardly constantly. I think this is the fourth or fifth appearance.

Q. What were you preparing for? A. Preparing in anticipation.

Q. For this kind of case; this kind of testimony? A. Not simply preparation for legal testimony but theses in the field. I am hoping to write papers and so on.

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[173] MR. PIERSALL:

Q. Look at "Blazing Films," Voluem 4, Number 1. I don't know what page. They don't bother to put page numbers, but there seems to be a picture here, two pictures on the two pages spread apart that, well, you can look at them.

There are the pictures of what appears to be a female genital and in very close proximity to that a male genital. A. Six or eight inches distance, I would say.

Q. Here is a female laying on her back on top of a male with the male and female's genitals exposed and the head of a third person and a tongue sticking out in close proximity to that area of the genitals of the female. A. Right.

Q. You don't think any of that appeals to the prurient interest in sex? A. No, I don't.

Q. What do you think it appeals to? [174] A. It appeals appparently to the normal interest in sex, normal interest and curiosity in sex.

Q. You say three people involved in whatever they are involved in there, without going through the description of it again, is a normal sex activity? A. I don't think whether it is a normal sex activity is a proper question. I said it appealed to the interest and curiosity; normal interest and curiosity.

Q. All right. That appeals to the normal interest in sex, you say.

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[175] MR. PIERSALL:

Q. Doctor, this book is "In Private," Volume 1, Number 1. I will just turn to the middle of the book and there is a picture of what looks to be three females stacked one on top of another with their posteriors exposed very plainly there. A. I believe that is what it is.

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Q. Would that appeal to the prurient interest in sex? [176] A. No.

Q. What does appeal to the prurient interest in sex? A. Let me explain, and this question comes up frequently. Of course, the terminology is not that of my science, prurient interest in sex. All I can do as a psychologist is to try to bring from my science to the law what might be informative or relative to the law.

The prurient interest is a term coined by the law. It belongs to the profession of the law and I do the best I can to accord with that.

Q. Let me interrupt you. You have testified here as to what the prurient interest is, as to the fact these books don't appeal to the prurient interest so you have made an effort, whether it be as a layman's effort within the law or psychologist's effort, so you have made an effort. I am just asking you if you can, in that same vein, tell me what the prurient interest is if this is not. A. Yes. In order for something to appeal to the prurient interest, as I understand the definition, one would have to contrive something that would appeal to a shameful or morbid interest [177] in either sex, nudity, or erection, to the average adult.

Q. Let me go through that. One would have to contrive something which appeals to the what, now? A. To a morbid or shameful interest in sex, nudity, or erection.

Q. Morbid or shameful. Would you say lascivious? A. I have a lot more difficulty understanding that.

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[180] THE COURT: As an expert, and I am recognizing him as an expert, I want his opinion. I don't care what Joe Blow said. I want to get his opinion and then if he would like to tell me about the Commission, I will be glad to hear it.

MR. DIETZ: May the record show I except to Your Honor's ruling?

THE COURT: Yes, sir.

A. If I remember the question, you asked me to give you an example of something that would appeal to prurient interest. I don't know how to do that. You said to give you a photograph or something.

Q. No. Let me put it this way. I have shown you a picture of, I think, some men and women all wrapped up together. I don't know if I showed you that or not, but I showed you a picture of some women all wrapped up together with their genitals exposed, and if I wanted, I am sure I could come over here and show you something else.

If that does not appeal to the prurient interest in sex, what would? I can't contrive anything, myself, to be frank with you.

Are you saying that nothing would be [181] obscene? A. I am saying that what is obscene has to meet the test.

THE COURT: I think what Mr. Piersall is trying to ask you is if you don't think these magazines are obscene, what do you think is obscene?

A. What I have tried to explain is that I feel obliged, and that is the way I have proffered it here. obliged simply to respond to a definition from a sister profession; to bring scientific data from psychology, which may be of some assistance to law.

THE COURT: What are you talking about? What word are you speaking about?

A. Obscene.

THE COURT: "Obscene" is a good, plain, English word, and you don't have to be a lawyer or doctor or psychologist or an architect to know what it means. The average person with any degree of intelligence

understands the word. Now, you have got tests on this type of case, that's true.

A. Yes, sir. If we are not talking about the [182] test–

THE COURT: You are talking as though you don't know what the word "obscene" means. You say it is a legal word and you speak of your assistance and being a psychologist.

A. I understand the common usage of the word "obscene."

THE COURT: All right. Then give us an answer.

A. The most common usage is related to religious tenents. Certain words and phrases were probably the origin of the word "obscene," so in that case, so that any word violating traditional religious tenents is obscene, if we take the general meaning.

MR. PIERSALL: Q. I will show "Twitch" to you. I showed "Throttle" to someone a while ago. This ones series of pictures shows, it looks like two women and one man in various positions. A. That's right.

Q. For instance, here is one which would very definitely indicate someone is about to, if they hadn't already, committed sodomy; is that not [183] true? A. Would suggest it?

Q. Wouldn't you say that suggests it? A. No. To me the suggestion is a posed photograph.

Q. The man has his tongue sticking out there about two inches from the female vagina, isn't that true; maybe three inches? A. Not from the vagina but from the woman's femur.

Q. What does it suggest to you? Of course, the pictures are still pictures. A. Yes. All of these suggest to me–you mean what message do they communicate to me as an individual?

Q. Yes. A. They communicate to me that sex may be used for play.

Q. Any hard core pornography would do for that, would't it?

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[184] MR. PIERSALL:

Q. You said these suggesting sex could be used for play? [185] A. Any hard core pornography could be used, but the facial, a more involved neurotic attitude.

Q. So you could justify hard core pornography by your reasons? You could say it is not obscene?

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A. I would say some might be; some might, some might not.

MR. PIERSALL:

Q. You have given an explanation for this which I assume you are going to say, therefore, makes it not appeal to the prurient interest because you said it suggests sex can be play, and, therefore, doesn't appeal to the prurient interest? A. That would be one reason. There are other reasons for knowing it doesn't appeal to prurient interests. For instance, we know ordinary, normal people are sometimes exposed to neurotic material on a wide range, from this up to hard core; what it apparently does is simply increase slightly the likelihood that they will [186] engage in their traditional sexual behavior.

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Q. The point is, Doctor, whether or not any particular individual would be aroused by this literature is not the point, I don't think. The point is does it appeal to that interest? Would it tend to appeal to prurient interests; You say [187] none of it would tend to appeal to prurient interest other than a sick person? A. It would not tend to appeal to the prurient interest of the average adult.

Q. But it would tend to appeal to somebody other than an average adult? A. Possibly.

Q. You know what the average adult is? A. Yes.

Q. All right. Now, you say that these things have some redeeming social value? A. Yes, sir.

Q. What redeeming social value would that last book I showed you have, the one that had the men and women all wrapped up together, with a tongue sticking out? A. About the same I mentioned when I answered that question.

Q. I don't remember. Will you repeat it? A. I will try. That they satisfy to some degree a normal interest and curiosity about sexual matters; that they may be of some aid in marriage for couples who have some difficulties with their sexual relationship, and they represent a traditional bond among males, at least in [188] our society, of sexual humor.

They are very frequently used in a social setting shown around among a group of men who share vigorous, humorous remarks with one another.

Q. With that in mind, do you recognize that there might be some printed items which might be obscene? A. Any one that satisfies the test would be obscene.

Q. Would you know of anything that would satisfy the test you just gave? Is there anything printed that would not tend to, which could not pass your test and still be obscene?

You are saying that these tend to cause people to be aroused, some people. You said some people. You didn't say the average person but some people, wouldn't tend to be aroused by that. Would that not be true of hard core pornography? A. I don't think I made the answer you characterized.

Q. Would you say it might cause certain people to be aroused? A. I don't remember saying anything like that.

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[189] Q. Maybe I didn't state it, but didn't you say it was used by certain married couples? A. Yes, sir; for certain purposes for presexual responses activity.

Q. To be aroused? A. Yes.

Q. Wouldn't that be true of anything, even hard core pornography? A. No, I think some things are not suitable for that purpose.

Q. How about hard core pornography? A. That is what I mean. Some types are not suitable. Some types are.

Q. Some types of hard core pornography, in your definition, would not be obscene? A. Yes, that is right.

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[190] DR. HERMAN RICHARD KASTNER, a witness called in behalf of the Respondent, having been first duly sworn, was called to the witness stand, and upon being examined, testified as follows:

DIRECT EXAMINATION

EXAMINED BY MR. DIETZ:

Q. Please state your full name and address. A. Richard Herman Kastner; business office, 7518 Riverdale Road, New Carrolton, Maryland.

Q. You are a Doctor of Medicine, specializing in psychiatry? A. I am a Doctor of Medicine and Psychiatry and also a Doctor of Philosophy and Psychology.

Q. Will you please state your credentials, how you obtained your degree; what universities, institutes of higher learning you attended, and [191] what papers you have written and what experiences you have had in the practice of psychiatry. A. I took my original Master's degree at New York University in psychology and English; Master's degree in psychology, City College, and Doctor of Philosophy and Psychology, New York Univer-

sity; between the year 1952 and 1956, I attended medical school in Philadelphia and received my Doctor of Medicine degree in 1956; the internship from 1956 to 1957 at St. Luke's Hospital, Bethlehem, Pennsylvania.

From there I left for the University of Minnesota then to Mayo Complex, Rochester, and served two years residency in psychiatry and was activated as military psychiatrist. I served with the Air Force for two years on active duty as a military psychiatrist and two years as a consultant to the Armed Forces Institute of Pathology.

After that I joined an institution called The Protection Institution which is a special protection for recidivist patients, criminals, and spent two years on the active staff as Director of Research.

I was consultant for the National Institute of Mental Health and Psychiatrists. I am [192] in private practice, as a "shrink," so to speak.

Q. How many years have you been in private practice? A. Eight, nine, ten years.

Q. Doctor, have you even been qualified as an expert to testify in any court in any states or in any federal courts? A. Yes. I testified, of course, for the State of Maryland on a number of occasions to commit a patient to the Patuxent Institution, and also I testified in the District of Columbia in the federal courts.

Also, I was at St. Elizabeth's Hospital for one year.

Q. Dr. Kastner, have you had the opportunity prior to today to review the magazines, the same as are contained in the Court's cardboard cartons on the table and on the floor here today? A. You delivered a series of cartons of material which were put in my office. I then reviewed this for some five and a half hours.

Also, reviewing some of it currently, the current literature and some of the opinions and ideas, and in

addition to this, I took the liberty of speaking to two or three private [193] psychiatrists, informal discussions, asking their general opinions in the matter.

Q. Doctor, upon your review of the magazines which we have here in court today, can you give us an opinion as to whether or not these magazines or the contents thereof would appeal to the prurient interests of the so-called average person? A. I would like to, with Your Honor's permission, clarify one thing in this matter, the term "prurient" is a social definition, a social term and what constitutes prurience has to be, in a manner of speaking, statistically defined; one particular culture, one particular time it may be considered prurient and another culture, another time, it may not.

A typical example would be the Bikini bathing suit, which, in 1920, would have been considered quite prurient.

The question of whether this material is prurient really should be derived at as a matter of statistical analysis of what is going on.

You have no way of really understanding this. The material constituted various forms of intended or actual portrayal of and I think this is unimportant at the moment whether they were or [194] were not, these sexual activities, and these include cunnilingus and fallatio plus, perhaps, some idea of intercourse to a psychiatrist and practicing physician, both as a general practitioner and as a specialist, these particular forms of sexual activity are not necessarily but may be aberrant, that is abnormal.

The term "prurient," if I am using it correctly, would be restricted to a very small population. Therefore, I would say to most people it would not necessarily appear to be prurient.

Q. Doctor, in your use of the word "prurient," have you had the opportunity before today and again to review today the definition of "obscenity" as appears in the case of Roth versus the United States 354 U.S. 70? A. I have read it and I must admit that although I read it several times, I have some difficulty as a psychiatrist, understanding the legal terms. I have a general idea.

Q. Now, Doctor, in your review of this material, can you tell the Court it contains anything of medical value or of redeeming social value? A. Well, first of all, one of the things that [195] I had been curious about was whether this material became a significant stimulant, a pathological stimulant to people. The term "pathologic" here means a sick kind of relationship that would produce sick behavior and have it acted out in an inappropriate manner.

When most of the people saw this, and I have given this to perhaps twenty or thirty people for evaluation, most of the people that saw it, it was sort of an enlightening, stimulating situation.

After they had gone through one or two of the literature, maybe three or four, they tended to become rather bored with it and looked rather prosaic.

Secondly, in discussing this matter with other physicians in terms of people who commit sexual acts that are dangerous to society, pedophile, the person who is involved with child molesting or the person who may involve himself in rape, many times these people have no sexual outlet whatsoever.

They have no means of satisfying their sexual impulses and I took the liberty of discussing this with child psychiatrists and one of the psychiatrists felt— MR. PIERSALL: We object to what some [196] other psychiatrist thought.

A. My opinion was consistent with his.

THE COURT: If you give your opinion, it's all right.

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A. Think you very much, Your Honor. All that I am saying, in general, is that sometimes the books do have some very significant value. Other than that, when it comes to the naivete of many of the patients who have little sexual experience, there are a variety of appropriate instructional books.

[197] Whether this would be considered appropriate as a matter of artistic endeavor, well–but I will say from a medical point of view, these characteristics, these activities, these behavior patterns, cunnilingus and fallatio are rather usual activities among even normal married people.

These become merely decorative elements or instructive material for people who are not informed about the normal activities and who have, perhaps, some sense of guilt or shame about it.

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CROSS EXAMINATION

EXAMINED BY MR. PIERSALL:

Q. As I understand it then, you are saying that these books–let me try to paraphrase what you said. These books do not appeal to the prurient interests because their portrayal of sex– A. That is not what I said, sir. I said they do not appeal in general to the prurient interests although they may appeal to the prurient interests of a limited group of people.

Q. You said the reason for that is because these are all normal sexual activities described? A. I would prefer to use the word "normal" [198] in the sense that they are normally carried out in the privacy of one's own home.

That's fine. I can understand what you are saying. The thing that bothers me here is that you are saying then that these do not appeal to the prurient interests because they only depict actions which are carried out in the privacy of one's home, right? A. No. I think they have to appeal to the prurient interests when it is so surreptitious and so hidden that they have a great deal of mysticism about it.

People, well, for example, I would say let's pick out a gentleman in the audience here and ask him theoretically if he ever involved himself in the particular kind of activity and I would estimate 50% or 60% or 70% had done this.

Therefore, although this may be stimulating, it may be interesting, and it may be sexually stimulating, I don't think necessarily it pertains to the prurient interest.

Q. What else is it? A. There you come into a peculiar situation of what constitutes prurient interest to the individual. To some people it would be prurient. To [199] others it would not.

Q. What you are saying, in fact, is that nothing would be obscene to you, would it? A. Not to me. We have to clarify it.

Q. By your definition? A. I am saying to most people these pictures, this particular material would not be obscene.

Q. Let me interrupt you. By the explanation you have given, I would dare say that explanation would fit anything, any depiction of normal sexual activity? A. A bikini—there is an interesting article in the Washington Post that a bikini might be prurient to the DAR. I am sure it is quite possible.

Q. Why would it be prurient? A. Because to some people, to them, it is offensive. Any kind of social action will also be offensive to a limited group of people.

Q. What you are saying then, in your opinion, the depiction of sex in these books is not offensive to the average person, is that right? A. No. I will say it is not offensive. It may be stimulating, and I have seen the books, and if you want to give me the three stacked ladies, I am well aware of that. I think they are probably [200] stimulating, I think surreptitiously to the males and I think it enhances their image in their fantasy, but not prurient.

Q. Wouldn't hard core pornography do the same thing? A. I took the liberty of listening a few minutes ago, and I am confused about what you call hard core pornography. Some people might call this hard core and some wouldn't.

Q. There is something else that is called hard core pornography? A. I don't know what it would be.

Q. You don't? You can't conceive of anything worse than that? A. I can conceive of something different from this.

Q. You are saying this does not appeal to the prurient interest and you say hard core pornography, you don't know exactly what that is? What would appeal to the prurient interest of the average person? A. I have absolutely no idea what would be prurient interest unless I went out as a scientist and sampled, with appropriate mathematical tools, what constitutes prurient material.

[201] Secondly, I think you have to define this beforehand. There have been no statistical studies as to what constitutes prurient interest. Prurient interest is a moral thing.

Q. It differs from person to person? A. Yes, and I must respect it.

Q. Prurient interest differs from person to person? A. Correct.

Q. You don't deny these books might appeal to the prurient interest? A. I say these books might tend to appeal to prurient interests of some but not to the prurient interest of most people.

Q. Do you know what the standards are of most people? Do you feel yourself qualified to say that? A. I wouldn't be that presumptuous.

Q. You have said it, though, haven't you? A. I will rephrase this. I will say I have come across a good number of professional situations which give me a reasonable indication of what constitutes unusual sexual behavior.

You may say because a psychiatrist is a psychiatrist he has to serve people coming to him, [202] but if you talk about this in a more common and more ordinary way, most of the people engage in the various same activities that are demonstrated in that particular set of literature.

Q. But that doesn't mean the depiction of even the normal act of coitus—without getting into a debate as to whether or not these other things are normal, I think we can all accept that an act of coitus is a normal thing with married people— A. To some it isn't, sir. Many women do engage in sexual contact and they dislike it intensely. I think we ought to clarify this.

Q. Fine. Even the normal act of coitus could appeal to the prurient interest, couldn't it? A. To a group of people who are disturbed.

Q. They have to be sick? A. Yes. I think you have to have, if not a psycho—

Q. What is prurient interest?

MR. DIETZ: He didn't finish the answer.

I would like to hear it.

A. Thank you. What I am trying to really say is that there are people who are sick and see this as a normal act or abnormal act. I think the [203] question comes up as

to what constitutes prurient interest, and prurient interest is merely a social term. I have no knowledge of it as a psychologist. I have no knowledge of it as a physician, and I have no knowledge of it nor do I recognize it as a psychiatrist.

If you would ask me does this material offend people, I would say to you, "Not necessarily."

I think it is startling, demonstrative, stimulating, interesting, but I don't think it is necessarily prurient to most people.

Q. To most people, the people you have discussed it with are other psychiatrists, is that right? A. I have given it to some of the patients to examine, too.

Q. How many patients? A. About twenty all together. I sampled about twenty people.

Q. Of your patients? A. Well, I can't go to someone else's patients.

Q. How many of these cases have you testified in? A. This is the first case I have ever [204] testified in as to this particular situation.

Q. What do you mean by this particular situation? A. For this kind of literature.

Q. Have you ever testified in any other obscenity cases? A. No.

Q. That's all.

THE COURT: Would you agree with this definition of the word prurient? "Given to or springing from lascivious?–

A. Yes, I would but with one comment added to it; the individual lascivious thought. It must reside within the individual.

THE COURT: A lascivious thought would, but a group–

A. It is an individual concept, sir.

THE COURT: Don't you think that with that sort of material, with people that go into these stores and buy that sort of material, don't you think it is because of the lascivious viewpoint of their nature?

A. Can I translate that into medical terms?

THE COURT: Yes.

[205] A. I think they are interested in the hidden and abnormal and unusual and they are interested in a sort of a forbidden taste of the forbidden fruit, but whether this is lascivious, and lascivious implies sexual bestiality, it implies this: not necessarily. Not necessarily.

For example, I will say I recall in the military when we went through the bunks, the men had pin-ups of women there. During World War Two if a girl would be in a bikini, it would be considered lascivious. It would not be considered lascivious now. If you go in swimming now with any more than a bikini, you would be considered over-clothed.

To some people it would be considered lascivious. To most people it is probably a very stimulating situation which he ends up being bored with afterwards.

We saw this in medical school, by the way. In the third year medical school, they brought in drity movies. Everybody would rush to see it, and by the time they brought in the third movie, we would say, "The hell with it" and go back to the laboratory and work.

THE COURT: You referred to the DAR. Were [206] you referring to the Daughters of the American Revolution?

A. Not in a disparaging manner.

THE COURT: Why do you think a young girl in the DAR is different from any other young girl who goes to church?

A. No, sir. I was commenting on something in the newspaper.

THE COURT: Evidently the newspaper felt that way.

A. No. The newspaper was trying to show that certain organizations are more conservative, as it should be, and certain organizations are more liberal, and it depends on left or right where it stands.

To a Democrat, a Republican is a fascist—I am being very candid—and to a Republican, a left-wing Democrat is a Communist. It really depends upon where you stand.

The comment about the DAR was only brought in to bring out a standard to judge that there are different communities, different people and different standards and to some people certain materials would be lascivious or prurient. To other people it would not, and I think this is the real [207] issue, Your Honor.

THE COURT: In your judgment then, Dr. Kastner, it is my understanding from your testimony that you feel that the majority of our citizens, and I am referring to what would normally be considered the average citizen, that these magazines would not be obscene?

A. Not necessarily, sir.